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Report

Transparency and Anti-corruption Chapters in International Investment Agreements

Mapping and Analysis

For:

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EXECUTIVE SUMMARY

This report maps and analyzes the content of substantive **transparency and anti-corruption provisions** included in a select sample of eighty-two international investment agreements ("**IIAs**") concluded between the years 2010 and 2023.

TRANSPARENCY COMMITMENTS

An overwhelming majority of eighty IIAs include commitments for ensuring transparency, either in the form of a distinct chapter on transparency or as a single transparency provision. Transparency commitments can be divided into (1) commitments of publication, (2) commitments of engagement, and (3) commitments of good governance.

(1) Commitments of publication

All eighty of the IIAs with transparency commitments mandate the publication of investment measures, often qualified by the term "prompt publication". Very few IIAs incorporate express timelines and procedures. A duty to publish investment measures electronically is prevalent in forty-five of the eighty IIAs, although defined modes and platforms of electronic publication vary. Only eight of the forty-five IIAs mandate digitalization or the use of e-government tools for publication. Of the eighty IIAs, seventy-five IIAs have a generic commitment to publish investment measures ("all investment measures"), four IIAs list out the precise measures to be published and one IIA does not specify the scope at all. More than half of the eighty IIAs extend the duty to publish to proposed investment measures. Conversely, less than half of the eighty IIAs contain carve-outs from publication to protect public order or for other reasons.

(2) Commitments of engagement

Commitments of engagement complement commitments of publication by allowing contracting States and interested persons to provide their opinions on the published measures. A majority of fifty IIAs provide for a right of interested persons to comment. Among those fifty IIAs, fifteen IIAs also set out procedural requirements as additional obligations to the right to comment. Sixty IIAs obligate contracting States to respond to inquiries from the other contracting State(s) only, fifteen IIAs provide for a duty to respond to inquiries from both contracting States and interested persons and one IIA provides for a duty to respond to interested persons only.

(3) Commitments of good governance

Commitments of good governance seek to ensure that States are transparent in their decision-making. Fifty-three of the eighty IIAs provide for the impartial administration of measures of general application. Among these IIAs, all except the Angola–European Union ("**EU**") Sustainable Investment Facilitation Agreement ("**SIFA**") (2023) also provide for an administrative review or appeal mechanism and a reasonable opportunity to be heard.

ANTI-CORRUPTION COMMITMENTS

A minority of twenty-five out of the total eighty-two IIAs analyzed contain substantive anti-corruption provisions. Such provisions are more prevalent in IIAs concluded by North/Central American and European countries, compared to Latin American, African and Asia-Pacific countries. However, the number of new IIAs signed containing such provisions has remained relatively stable over the past fourteen years. Anti-corruption obligations can be (1) State-directed or (2) investor-directed.

(1) States-directed obligations

Among the twenty-five IIAs, four types of States-directed obligations are prevalent, including: (a) obligations to ratify and/or implement anti-corruption conventions, directly impacting States' international law duties (eighteen IIAs); (b) obligations to adopt regulatory measures against corruption (twenty IIAs), with varied scopes (e.g., criminalizing corruption, extending to the corruption of foreign public officials, or mandating action against legal entities); (c) obligations, sometimes asymmetrical, to effectively enforce such regulatory measures (fifteen IIAs); (d) obligations to cooperate internationally (nineteen IIAs), with some merely reaffirming pre-existing cooperation initiatives or international law duties, while others adding substantively to the contracting States' international law duties (e.g., technical or agency cooperation).

(2) Investor-directed obligations

Only the Economic Community of West African States ("**ECOWAS**") Common Investment Code (2019) imposes direct obligations on investors to refrain from corruption and to adhere to good accounting and corporate governance standards. That said, eight IIAs penalize corruptly-made investments by stripping the IIA protection or access to dispute settlement that would otherwise be afforded to investments.

DISPUTE SETTLEMENT FOR TRANSPARENCY AND ANTI-CORRUPTION COMMITMENTS

The report also examines whether the transparency and anti-corruption commitments in the dataset are subject to (1) State-State dispute settlement ("**SSDS**") and (2) investor-State dispute settlement ("**ISDS**").

(1) State-State dispute settlement

Exceptionally, two IIAs in the dataset do not contain any binding SSDS provisions, which is explained by political and cultural reasons. In line with an emerging trend to exclude trade facilitation features from formal dispute settlement, in nine of the IIAs the contracting States' consent to subject transparency and/or anti-corruption commitments to SSDS is partial or conditional. In three other IIAs, anti-corruption commitments are excluded from SSDS altogether. Procedure-wise, SSDS in most of the IIAs under review takes the form of international arbitration. In seven IIAs specific procedures applicable to disputes arising out of transparency and/or anti-corruption commitments are set out, requiring the participation of the relevant domestic authorities in the consultations, and the appointment of arbitral tribunals or panels with relevant expertise.

(2) Investor-State dispute settlement

Over half of the IIAs in the dataset do not provide for ISDS, either because the IIA in question is not of an investment protection nature or because the contracting States have made a deliberate decision to exclude ISDS. In the IIAs that do provide for ISDS, transparency and anti-corruption commitments are very rarely subject to it. Nevertheless, even when not formally subject to ISDS, investors may attempt to use these commitments as relevant context in relation to an allegation of a breach of one of the standards of investment protection, notably the fair and equitable treatment ("**FET**") standard. Contracting States can seek to minimize this risk by clarifying the scope of the FET standard and including "firewall provisions" aimed at insulating investment facilitation features from ISDS.

INTRODUCTION

1. This report is prepared in the context of UNCTAD's IIA Mapping Project. UNCTAD's IIA Mapping Project is "a collaborative initiative between UNCTAD and universities worldwide to map the content of international investment agreements,"[1] which include bilateral, regional and international investment treaties as well as treaties with investment provisions such as free trade agreements ("**FTAs**").[2] The results of the mapping conducted under the auspices of the IIA Mapping Project are reflected in UNCTAD's IIA Navigator which is "the world's most comprehensive free database of investment treaties and model agreements" that includes detailed information about the content of IIAs.[3]

2. This report is focused on a mapping and analysis of (1) substantive transparency provisions, which deal with the "transparent publication of investment-related laws, regulations, policies and practices at local, national and international levels";[4] and (2) anti-corruption provisions, which are aimed at "preventing and combating corruption associated with transnational investment activities".[5] Both types of provisions represent core elements of "good governance" and are aimed at facilitating sustainable investment.[6]

3. Although transparency and anti-corruption provisions had gained limited attention in the past, there has been a marked shift in recent years. It has now become more common for States to enshrine the principle of transparency or affirm their commitment to combat corruption in the preamble of IIAs and even to include "horizontal" chapters and provisions dedicated to transparency and anti-corruption in their IIAs.[7] Increased usage of transparency and anti-corruption provisions has given rise to several practical

[1] UNCTAD, "UNCTAD IIA Mapping Project", 1, available at: https://investmentpolicy.unctad.org/.

[2] UNESCAP, *Foreign Direct Investment and Sustainable Investment in International Investment Governance* (Bangkok: UN, 2019), 27.

[3] UNCTAD, "International Investment Agreements", available at: https://unctad.org/topic/investment/international-investment-agreements.

[4] UNESCAP, *supra* n. 2, 32. For the avoidance of doubt, this report does not deal with procedural transparency provisions, which concern "the transparency of investment dispute settlement proceedings". See ibid.

[5] Ibid., 31.

[6] Ibid.

[7] Generally, see Matthew Jenkins, "Anti-Corruption and Transparency Provisions in Trade Agreements", Transparency International (20 July 2018), 7.

questions, such as how to best draft and implement these provisions, especially considering the capacity constraints of developing States.

4. Empirical studies suggest that developing States "struggle to implement and comply with many of the international obligations they take on, principally [...] because of capacity limitations".[8] Given this, the report also focuses on three main constraints to implementation of transparency and anti-corruption commitments that developing States may face: (1) administrative constraints, which may include "lack of a clearly designated lead agency" for trade facilitation, corruption issues, "lack of coordination" between different State agencies, and "limited human resources";[9] (2) legal constraints on the domestic level (e.g., the need for domestic reform)[10] and the international level (e.g., inconsistency of transparency or anti-corruption commitments assumed under IIAs with existing international commitments); and (3) financial constraints.

5. In light of the above, the main research objectives of this report are (1) to identify the prevalence of the various types of transparency and anti-corruption provision in a select group of IIAs, including any relevant geographical and temporal trends; (2) to conduct an analysis of the different drafting approaches to transparency and anti-corruption commitments identified; and (3) to identify the possible effect of the various drafting approaches on the implementation of transparency and anti-corruption commitments by developing States in light of relevant administrative, legal and financial constraints that these States may face.

6. The analysis is built on the results of an original mapping of a group of IIAs selected by UNCTAD, according to the mapping methodology provided by UNCTAD. A full list of ninety-nine IIAs was provided by UNCTAD, out of which seventeen IIAs were available only in Spanish or Portuguese, and two were available only in Russian. Given the

[8] N. Jansen Calamita, "Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value" (2020) 23 Journal of International Economic Law 973, 984.

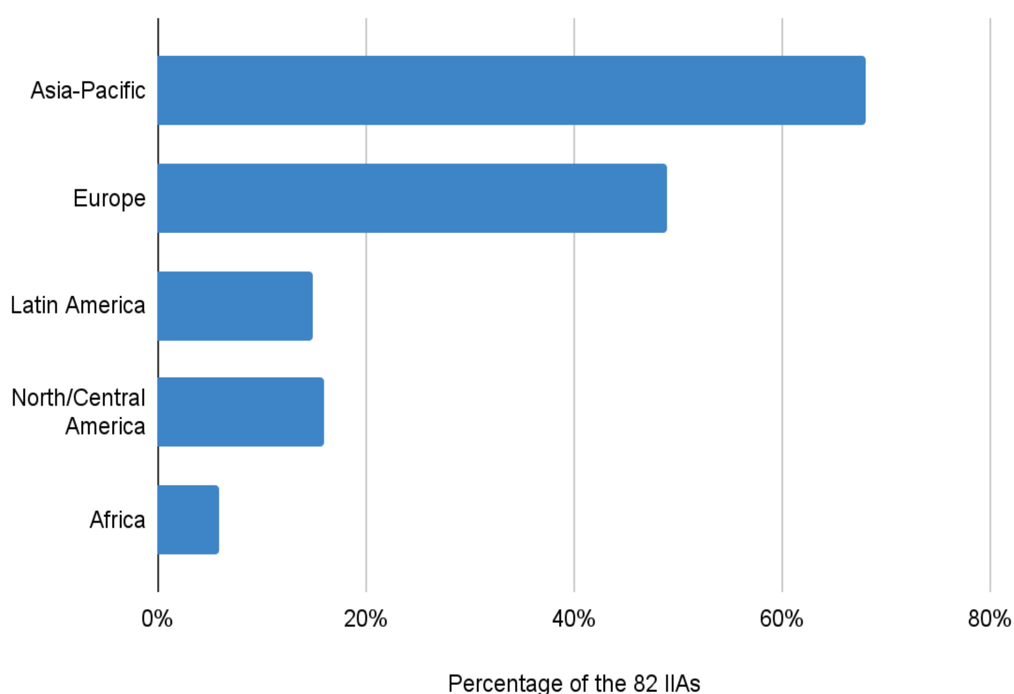
[9] These have been identified as "key challenging factors" by the countries in the Asia-Pacific region. See UNESCAP, "WTO TFA+ Implementation State of Play in Asia and the Pacific: Moving Towards Digital and Sustainable Trade Facilitation", ESCAP Trade Insights No. 28 (19 November 2019), 7.

[10] For instance, in federal countries national focal points that are responsible for providing information to investors on investment-related laws and policies "may not be able to perform such wide-ranging tasks without encroaching upon the functional autonomy of regional governments and local government authorities". See Kavaljit Singh, "Investment Facilitation: Another Fad in the Offing?" (2018) Columbia FDI Perspectives No. 232.

language capabilities of the project team, eighty-two IIAs have been mapped for the purposes of this report.

7. The selected eighty-two IIAs represent most of IIAs concluded in the period from 2010 to 2023 which have transparency and/or anti-corruption commitments and for which texts were available on the UNCTAD's IIA Navigator as of 1 January 2024. These eighty-two IIAs were concluded by States from all regions (**Figure 1**), and they amount to approximately 47% of the total 172 treaties with investment provisions that were concluded in the 2010–2023 period based on UNCTAD's IIA Navigator data.

Figure 1: Geographical spread of mapped IIAs



Source: Authors' mapping.

8. Twelve of the eighty-two IIAs under review had not come into force as of the time of writing. However, given that the report focuses on the analysis of drafting approaches to transparency and anti-corruption provisions, the fact that some of the IIAs are not in force does not bear any impact on the analysis.

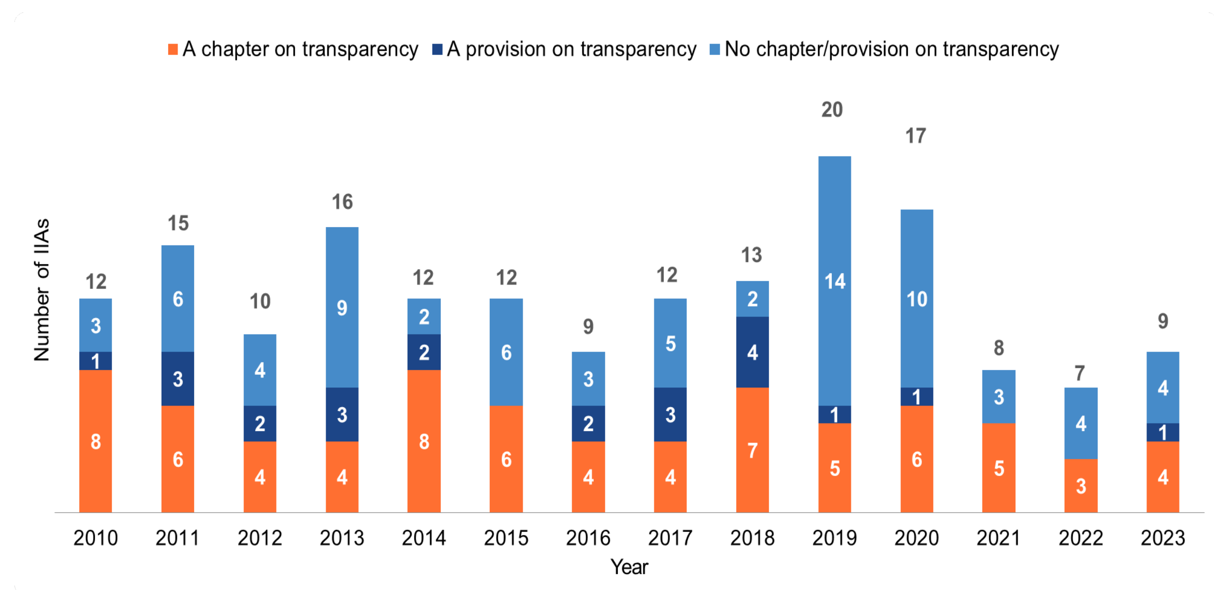
9. In accordance with UNCTAD's mapping manual, each IIA has been mapped by two persons acting independently. Individual mapping results were subsequently compared, calibrated and finalized. Final results have been consolidated into one Excel sheet that contains (1) the full list of ninety-nine IIAs provided by UNCTAD; (2) a single mapping of each of the eighty-two mapped IIA, showing the final mapping results; and (3) the details of both mappers. The full list of IIAs mapped is attached to this report as **Annex A**.

10. The report is structured as follows. **Part 1** presents the results of the mapping of transparency provisions commenting, in particular, on the prevalence of commitments of publication, stakeholder engagement and good governance, on the effect of different drafting approaches on the implementation of these commitments, as well as on whether these commitments are subject to dispute settlement. In a similar vein, **Part 2** presents the results of the mapping of anti-corruption provisions commenting, in particular, on the prevalence of State-directed and investor-directed obligations, on the effect of different drafting approaches on the implementation of these commitments, as well as on whether these commitments are subject to dispute settlement.

1. TRANSPARENCY PROVISIONS

11. The purpose of incorporating transparency provisions in IIAs is two-fold, namely, to ensure the accountability of the State's regulatory decision-making process and to instill confidence and predictability in the minds of investors.[11] **Figure 2** demonstrates that, of all 172 treaties with investment provisions signed between 2010 and 2023, ninety-seven IIAs, or approximately 56%, contain transparency provisions in some shape or form.

Figure 2: Prevalence of transparency commitments in all IIAs signed between 2010 and 2023 (number of IIAs)



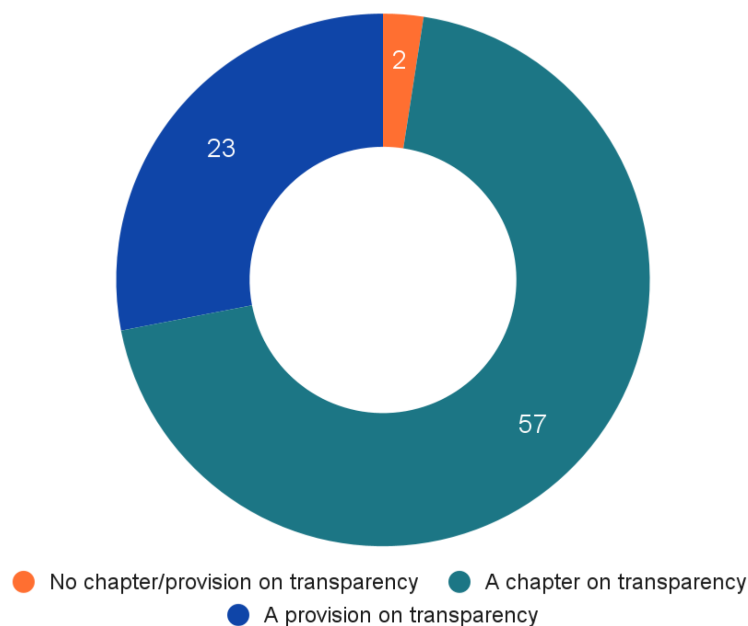
Source: Authors' mapping and UNCTAD's IIA Navigator.

12. Moving now to the eighty-two mapped IIAs of this report's dataset, **Figure 3** demonstrates that all but two include commitments on transparency. This underscores the growing acknowledgment by States of the need to adopt such commitments in their IIAs. The majority of the IIAs mapped (fifty-seven of eighty-two IIAs) contain a

[11] UNCTAD, *Transparency – UNCTAD Series on Issues in International Investment Agreements II: A Sequel* (New York and Geneva: UNCTAD, 2012), 7.

dedicated chapter on transparency, whereas less than a third (twenty-three of eighty-two IIAs) contain only a single provision on transparency. The only two IIAs in the dataset that include neither a chapter nor a single provision on transparency are the EU–Viet Nam Investment Protection Agreement (2019) and the EU–Singapore Investment Protection Agreement (2018).[12]

Figure 3: Prevalence of transparency chapters versus standalone transparency provisions in the mapped IIAs (number of IIAs)



Source: Authors' mapping.

13. Below, we break down the specific transparency commitments included in the mapped IIAs by looking at their drafting variations and any identified temporal or geographical trends. At the same time, where appropriate, we also seek to provide an understanding of the challenges that developing States may face in adhering to transparency commitments

[12] With respect to these two agreements, we note that they were originally intended as investment chapters in the broader FTAs concluded by the EU with Viet Nam and Singapore respectively (both of which do, in fact, include transparency chapters). The decision to separate investment protection from the broader FTAs and into distinct treaties is likely the reason behind the absence of substantive transparency provisions observed in these two instances.

under IIAs. To that end, we analyze three types of transparency commitments assumed by States, namely, commitments of publication (Section 1.1), commitments of engagement (Section 1.2), and commitments of good governance (Section 1.3). We also address whether these commitments are subject to formal dispute settlement (Section 1.4).

1.1. Commitments of publication

Key takeaways

Among the eighty IIAs with transparency commitments:

- All include a commitment to publish investment measures. Most of these are generic commitments to publish "all measures". However, some IIAs define the scope and type of measures that must be made public (e.g., through closed lists) or provide specific procedural requirements for publication (e.g., compliance with publication requirements under WTO agreements), which might increase the responsibility of the contracting States in ensuring compliance.
- Over half provide for electronic publication but this commitment is often discretionary.
- A majority (forty-nine of eighty IIAs) envisage publication of proposed measures in addition to adopted measures. The force of this commitment is not always mandatory.
- One-third have carve-outs to their publication commitments for the protection of the public interest and the maintenance of public order, or for other reasons.

Permissive language in drafting allows for greater flexibility and autonomy in application, but it can also lead to ambiguity in interpretation which may increase the risk of non-compliance for developing States.

14. The commitment to publish regulatory decisions relating to investment measures is an indispensable aspect of ensuring investment facilitation, accountability and transparency.

Availability and accessibility of information are paramount to ensuring transparency and accountability in international investment governance.

15. To assess the practical implications of such commitments, the current analysis delves into five mapping parameters shaping the obligation to publish, namely, whether there is a commitment to publish investment measures, whether there is an indication as to the scope or types of investment measures to be published, whether there is a commitment to electronic publication, whether proposed measures are also to be published, and whether there are carve-outs from the commitment to publish.

1.1.1. Publication of investment measures

16. All of the eighty IIAs with transparency commitments analyzed have incorporated a provision obligating States to publish investment measures. Such obligations come in two principal drafting approaches.

17. Under the first approach, the commitment to publish investment measures envisages an obligation on the contracting States to "ensure that [their] laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published".[13] This variation is found in the majority of the IIAs reviewed. A second drafting approach can be seen in Art. 7.2 of the Cambodia–Republic of Korea FTA (2022), which provides that each contracting State "shall ensure that its laws, regulations […] are promptly published or otherwise made publicly available in such a manner as to enable interested persons and the other Party <u>to become acquainted with them</u>" [emphasis added].

18. A common feature of the two drafting variations is that the commitment applies only with respect to investment measures contained in laws, regulations, procedures, and administrative rulings of "general application". This covers investment measures that intend to apply to a range of persons, goods or services, cases, and investors or investments. By contrast, a measure that intends to apply to any particular person, good or service of the other Party in a specific case, as well as an administrative ruling that

[13] See, e.g., Australia–India Economic Cooperation and Trade Agreement ("**ECTA**") (2022), Art. 10.2.

adjudicates with respect to a particular act or practice is outside the scope of the commitment to publish.[14]

19. While most of the IIAs reviewed present the above-mentioned generic approaches on the publication of investment measures, a few interesting variations and deviations have been identified below.

20. First, although a majority of the IIAs reviewed simply mention that the publication of investment measures must be made "promptly", in some instances States have sought to clarify the scope of that obligation by adding time frames and specific modes of publication. Approaches in this respect range from agreeing to a maximum time frame of 90 days to publish,[15] to committing to updating and publishing information on investment measures at least annually.[16]

21. Second, some contracting States have sought to list with more precision the exact publications commitments undertaken. One such provision is Art. 16 of the Investment Agreement of the China–Hong Kong Closer Economic Partnership Agreement ("**CEPA**") (2017), where an extended list of publication-related obligations has been included along with a detailed publication procedure to ensure that both contracting States are acquainted with each other's laws and policies.

China–Hong Kong CEPA Investment Agreement (2017)

Article 16: Transparency of laws and policies

1. One side shall, with a view to promoting the understanding of its laws and policies pertaining to or affecting covered investments:

(i) promptly make such laws and policies public and readily accessible, including by electronic means;

(ii) if requested, provide copies of specified laws and policies to the other side; and

(iii) if requested, consult with the other side with a view to explaining specified laws and policies.

2. One side shall ensure that investors of the other side can become acquainted with its laws and policies pertaining to the conditions of admission of investments, including procedures for application and

[14] Ibid., Art. 10.1 (with respect to administrative rulings).

[15] See Hong Kong–New Zealand CEPA (2010), Ch. 15, Art. 2.

[16] See ECOWAS Common Investment Code (2019), Art. 15.

> registration, criteria for examination and approval of an application, timelines for processing an application and rendering a decision, and review or appeal procedures of a decision.
>
> *[emphases added]*

22. Third, a small number of the IIAs reviewed extend the commitment to publish investment measures to also include a duty to bring such measures to the attention of the other contracting State. The exact scope of this duty is often left unaddressed. That said, IIAs with this feature provide that the commitment to publish is deemed to be complied when a contracting State makes the requisite information available to the government of the other contracting State, to international fora (such as the WTO), or to appropriate regional fora, as the case may be. An example of such a provision is Art. 134 of the Kenya–United Kingdom Economic Partnership Agreement ("**EPA**") (2020) which provides as follows.

> **Kenya–United Kingdom EPA (2020)**
>
> **Article 134: Transparency and Confidentiality**
>
> 1. Each Party shall ensure that any laws, regulations, procedures and administrative rulings of general application as well as any international commitments relating to any trade matter covered by this Agreement are promptly published or made publicly available and brought to the attention of the other Party.
>
> 2. Without prejudice to specific transparency provisions in this Agreement, the information referred to under this Article shall be considered to have been provided when the information has been made available to the Governments of the EAC Partner State(s) and the UK or to the WTO or on the official, publicly and fee-free accessible website of the Parties.
>
> *[emphases added]*

23. Fourth, a number of the IIAs concluded by the EU within the dataset (six of the eleven IIAs) seek to integrate the commitment to publication with applicable obligations under the World Trade Organization ("**WTO**") system. The provisions in two of the six IIAs concluded by the EU, simply "reaffirm" existing WTO obligations or commit the parties to cooperate in other multilateral fora on ways to promote transparency in respect of international trade and investment.[17] However, the other four IIAs create a more direct

[17] See EU–United Kingdom Trade and Cooperation Agreement (2020), Art. 332 ("The Parties affirm their commitments in relation to transparency under the WTO Agreement, and build on those commitments in the provisions laid down in this Title."). See also Canada–EU CETA (2016), Art. 27.5 ("The Parties agree to cooperate in bilateral, regional and multilateral fora on ways to promote transparency in respect of international trade and investment.").

and mandatory obligation on the contracting States to publish in a manner that fulfills the applicable requirements of the WTO obligations. One of the examples of this approach is Art. 171 of the EU–Kazakhstan Enhanced Partnership and Cooperation Agreement ("**EPCA**") (2015).[18]

> **EU–Kazakhstan EPCA (2015)**
>
> **Article 171: Transparency**
>
> All laws, regulations, decrees, decisions and administrative rulings of general application of the Parties pertaining to or affecting any matter governed by this Title shall be published promptly in a manner that fulfils the applicable requirements of the WTO Agreement, including those of Article X of the GATT 1994, Article III of the GATS, and Article 63 of the TRIPS Agreement.
>
> [...]
>
> *[emphases added]*

24. To comply with the above-mentioned obligations, contracting States need to ensure, for instance:

    a. The publication of relevant information on each of the subject matters envisaged under the various WTO agreements, including investment, intellectual property and cross border trade; along with

    b. The publication of information in accordance with the specific periodic and administrative requirements, which includes establishing enquiry points and notifying not only the concerned authorities of other member states but also compliance bodies, such as the "Council for TRIPS" and/or the "Council for Trade in Services" under General Agreement on Trade and Services (1995) ("**GATS**").

25. In so doing, these IIAs acknowledge the coexistence and substantive similarity of different publication commitments under various international agreements, such as the Agreement Establishing the World Trade Organization (1994) ("**WTO Agreement**"), including in particular Art. X of the General Agreement on Tariffs and Trade (1994) ("**GATT 1994**"), Art. III of the GATS, Art. 63 of the Agreement on Trade-Related

[18] See Central America–EU Association Agreement (2012), Art. 339; Colombia–Ecuador–EU–Peru Trade Agreement (2012), Art. 288.

Aspects of Intellectual Property Rights (1995) ("**TRIPS**"), and the provisions of the Trade Facilitation Agreement (**"TFA"**)[19] (**Box 1**).

Box 1. Summary of key transparency obligations under the WTO system

Trade Facilitation Agreement ("TFA")

In the TFA, WTO member have agreed to (1) the "prompt" publication of information related to cross border trade laws and regulations as applicable (however, no timelines have been specifically provided for such publication); (2) the publication of information through the internet; (3) the establishment of one or more enquiry points to answer reasonable enquiries of governments, traders, and other interested parties; and (4) notifying the Committee on Trade Facilitation of the details and location of publication.

General Agreement on Tariffs and Trade (1994) ("GATT 1994") and General Agreement on Trade in Services (1995) ("GATS")

Art. X of the GATT 1994 and Art. III of the GATS provides for similar commitments to publication. That is, WTO members are mandated to publish information on "all agreements affecting trade policy that a [S]tate is or might be a party to", along with information on their laws, regulations, judicial decisions and administrative rulings pertaining to domestic and international trade regulations.

Similar to the obligations under the TFA, Art. III of the GATS obligates WTO members to establish and maintain enquiry points for responding promptly to requests pertaining to measures of general application or to other international agreements entered into by them. They are also obligated to inform the Council for Trade in Services at least annually.

Agreement on Trade-Related Aspects of Intellectual Property Rights (1995) ("TRIPS")

Art. 63 of TRIPS mandates that information on trade-related intellectual property rights be notified and published to the Council for TRIPS.

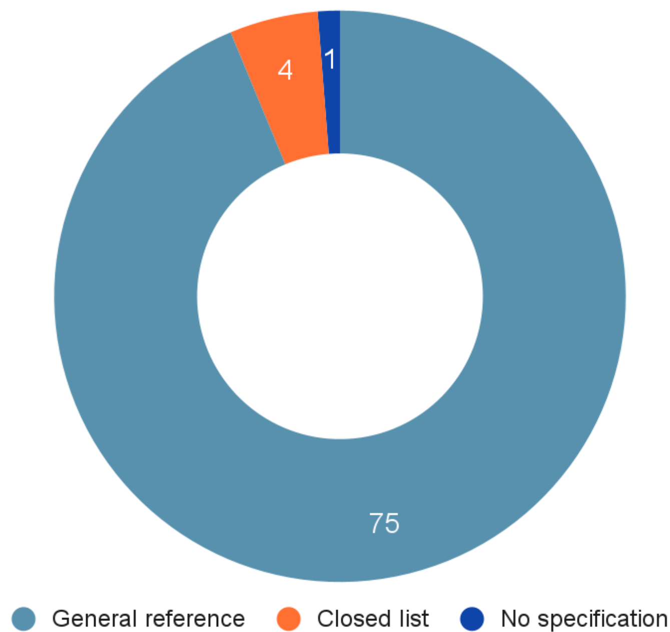
26. Publication commitments incorporating and harmonizing international obligations, such as in the EU examples above, may seek to ensure global cooperation and comity. Adherence with wide commitments of publication under other international legal instruments not only ensures compliance under the respective individual IIAs but also results in a broader and more comprehensive approach to ensuring transparency.

[19] See TFA, Section 1. We note that following the 2014 Protocol of Amendment to insert the TFA into Annex 1A of the WTO Agreement, the TFA has become part of the WTO Agreement for those States that have accepted the TFA.

1.1.2. Types of investment measures to be published

27. In the vast majority of IIAs reviewed, contracting States have chosen not to define or specify the types of investment measures that would fall under the scope of the publication commitment. Indeed, seventy-five of the eighty analyzed IIAs that feature publication commitments contain only a general reference to publish all measures falling within the IIA's scope (**Figure 4**). Only four IIAs contain a list of the types of investment and other measures that are covered by the treaty's publication commitments. Moreover, there is one IIA that does not contain any reference at all as to the scope and types of measures that should be made public.

Figure 4: Scope of investment measures covered by publication commitments (number of IIAs)



Source: Authors' mapping.

(a) General reference covering all measures relevant to the scope of the IIA

28. The vast majority of the IIAs under review include only a generic commitment to publish, mentioning “laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement”.[20] In so doing, contracting States to these IIAs subject themselves to a potentially wider commitment of publication.

29. An instance of an even wider commitment is Art. 15 of the ECOWAS Common Investment Code (2019), which provides that investment measures to be made public include “laws, policies, regulations, procedures, administrative rulings and judicial decisions of general application, <u>as well as international agreements after their entry into force</u>, which may affect investments in its territory, including among others, exchange regimes and those of fiscal nature” [emphasis added]. Similar to the commitments of WTO members under the TFA, GATT 1994 and GATS, the members of ECOWAS are obliged to inform and notify each other of any existing or new international agreements entered into by them which might affect investments.

(b) Closed list of investment-related or other measures to be published

30. A different drafting approach followed by a minority of the IIAs within the dataset is the inclusion of a closed list of investment-related, and sometimes other, measures that must be made publicly available.

31. An example of a closed list can be seen in the recent Angola–EU SIFA (2023).

> **Angola–EU SIFA (2023)**
>
> **Article 9: Transparency of investment framework**
>
> 1. Each Party shall make available via electronic means such as a website and, where practicable, accessible through a single portal, and update to the extent possible and as appropriate, the following:
>
> <u>(a) laws and regulations specifically concerning investment;</u>
>
> <u>(b) restrictions and conditions applying to investment; and</u>
>
> <u>(c) contact information of relevant competent authorities for the authorisation of investment.</u>

[20] See also UNESCAP, *supra* n. 2, 32.

> 2. Each Party shall make available, where practicable via electronic means such as a website and accessible through the single portal referred to in paragraph 1, and update to the extent possible and as appropriate, a description that informs investors and other interested persons of the practical steps needed to invest in its territory including the requirements and procedures related to:
>
> (a) company establishment and business registration;
>
> (b) connecting to essential infrastructure such as electricity and water supply;
>
> (c) the acquisition and registering of property such as land ownership rights;
>
> (d) construction permits;
>
> (e) resolving insolvency;
>
> (f) capital transfers and payments;
>
> (g) convertibility of currency;
>
> (h) the payment of taxes; and
>
> (i) access to finance, especially for MSMEs.
>
> *[emphases added]*

32. In addition to the publication of investment measures, Art. 10 of the same IIA mandates the publication of investment incentives also.

> **Article 10: Transparency of investment incentives**
>
> 1. Each Party shall make available via electronic means such as a website and, where practicable, accessible through a single portal, and update to the extent possible and as appropriate, information on investment incentives.
>
> 2. The information referred to in paragraph 1 shall cover all the incentives available to investors, including financial incentives, fiscal incentives and in-kind transfers, including non-financial incentives.
>
> 3. The information referred to in paragraph 1 shall include the following elements:
>
> (a) the legal basis of the incentive;
>
> (b) the form of the incentive;
>
> (c) the eligibility requirements of the incentive;
>
> (d) the application process for the incentive, including the required forms and documents; and
>
> (e) contact information of the competent authority.
>
> *[emphases added]*

33. An example where publication commitments are extended to measures other than investment measures is Art. 334 of the EU–United Kingdom Trade and Cooperation Agreement (2020), which provides that the Title on transparency "applies with respect to Titles I to VIII and Titles X to XII of this Heading and Heading Six", that is, to chapters on "Trade in Goods", "Digital Trade", "Capital Movement, Payments, Transfers and Temporary Safeguard Measures", "Intellectual property", "Public Procurement", "Small and Medium Industries", "Energy" Good Regulatory Practices and Regulatory Cooperation", "Level Playing Field for Open and Fair Competition and Sustainable Development".

34. By specifying the investment measures to be made public by a closed list or by extending the obligation to publish to subject matters other than investment, contracting States are expected to provide for, and maintain, regular information dissemination mechanisms to ensure compliance.

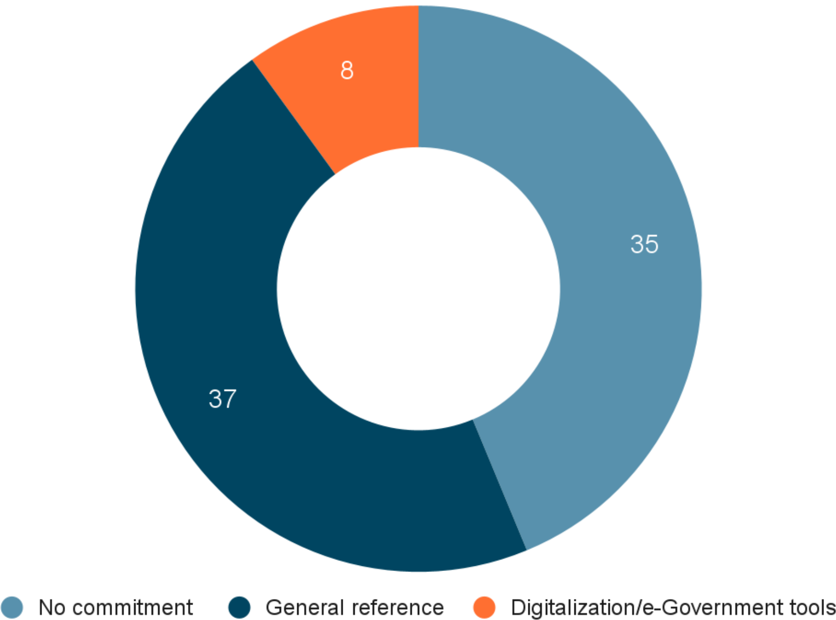
35. Closed lists give contracting States a concrete idea of what exactly must be published and therefore can give guidance for targeted resource allocation. That same precision, however, can be a double-edged sword. Coordination challenges across various levels of government compromising the publication of the listed measures or subject matters makes a case of IIA non-compliance easier. Developing or resource-strapped economies can be especially vulnerable to this risk. For instance, a developing State with a federal system of governance might find it burdensome to collect, assimilate and ensure the publication of information from different governmental authorities or bodies overseeing different subject matters, such as taxation, competition, trade, and human resources.

1.1.3. Electronic publication

36. Publishing investment measures electronically promotes transparency, accessibility, efficiency, and accountability in the investment process, all of which ultimately contribute to a more open and well-functioning investment environment. However, in an era of electronic communication and increasing digitalization of State administration, nearly half of the IIAs in our dataset (thirty-five out of eighty IIAs analyzed) do not contain any commitment for the electronic publication of investment measures.

37. Of the forty-five IIAs that do mention electronic publication, the vast majority (thirty-seven of forty-five IIAs analyzed) contain only a general reference to the electronic publication of investment measures. A rather low number of only eight IIAs go a step further in suggesting publication through digitalization, designated single portals or e-government tools (**Figure 5**).

Figure 5: Commitment to publish investment measures electronically (number of IIAs)



Source: Authors' mapping.

38. Our review indicates that States tend to use different terms to refer to electronic publication.[21] Moreover, provisions on electronic publication are often worded in discretionary or permissive, as opposed to mandatory, language. Discretionary language provisions are those which include phrases, such as "including through the internet or in

[21] See, e.g., Australia–India ECTA (2022), Art. 10.2 ("made available in the public domain including on an official website"); Australia–Malaysia FTA (2012), Art. 17.3 ("To the extent possible, each Party shall make the measures referred to in paragraph 1 available on the internet"); Pacific Alliance–Singapore FTA (2022), Art. 21.2 ("[…] freely accessible, searchable and updated regularly").

print form"[22] and "where feasible and possible".[23] Permissive language provisions are those which include aspirational language (e.g., the verb "endeavor") to introduce administrative, legal, or financial flexibility in the contracting States' commitment to publish investment measures electronically. For instance, Art. 29.6 of the New Zealand–United Kingdom FTA (2022) provides as follows.

> **New Zealand–United Kingdom FTA (2022)**
>
> **Article 29.6: Transparency**
>
> [..]
>
> "To the extent possible, each Party shall endeavour to ensure that information published by its central level of government with respect to any matter covered by this Agreement is accessible in open, machine-readable format."
>
> *[emphases added]*

39. In some instances, contracting States have also sought to specify the various outlets of electronic publication. For instance, Art. 29.2 of the United States–Mexico–Canada Agreement ("**USMCA**") (2018) includes an agreed list of official, publicly accessible websites of the United States, Mexico and Canada which shall be updated regularly.[24]

1.1.4. Publication of proposed measures

40. Extending publication to proposed investment measures serves to alleviate investors' concerns over unexpected changes to the regulatory environment in which they operate.[25] A majority of forty-nine out of the eighty analyzed IIAs in our dataset extend the commitment to publish to include proposed measures (**Figure 6**).

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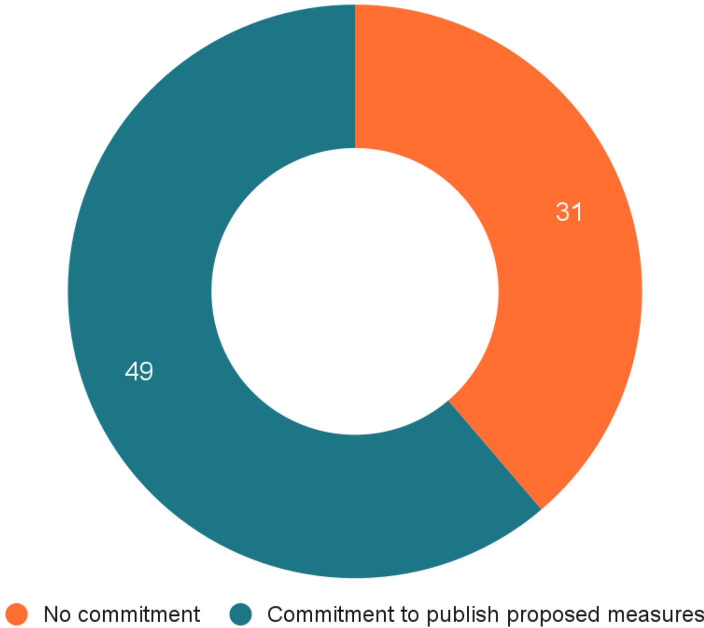
[22] See, e.g., Hong Kong–New Zealand CEPA (2010), Ch. 15, Art. 2, footnote 26.

[23] See, e.g., EU–Republic of Korea FTA (2010), Art. 12.3.

[24] See USMCA (2018), Art. 29.2

[25] See UNCTAD, *supra* n. 11, 22, 70.

Figure 6: Commitment to publish proposed measures (number of IIAs)



Source: Authors' mapping.

41. Our review indicates that there are two main drafting approaches among the IIAs that include a commitment to publish proposed investment measures, which may be described as the explicit and the implicit approach. The former is rare, appearing only in one of the eighty analyzed IIAs.

42. An explicit reference is one which defines the scope of a proposed measure. For instance, Ch. 13, Art. 3 of the Pacific Agreement on Closer Economic Relations ("**PACER**") Plus (2017) is an explicit provision which includes an open definition of what can amount to a proposed measure.

> **PACER Plus (2017)**
>
> **Article 3: Notification and Provision of Information**
>
> [...]

(Footnote under Article 3) For greater certainty, a proposed measure may include a policy discussion document, a summary of proposed regulations or the draft text of a law or regulation.

[emphases added]

43. By contrast, the implicit approach, where the contracting States agree to publish proposed investment measures but do not define what amounts to a proposed measure, is more common. An example can be seen in Art. 29.2 of the New Zealand–United Kingdom FTA (2022).

New Zealand–United Kingdom FTA (2022)

Article 29.2: Transparency

[..]

3. To the extent possible, when introducing or changing the laws, regulations, or procedures referred to in paragraph 1, each Party shall endeavour to provide a reasonable period between the date when those laws, regulations, or procedures, proposed or final in accordance with its legal system, are made publicly available and the date when they enter into force. [...]

[emphases added]

44. An explicit reference to what amounts to a proposed measure can help organize and guide developing State authorities as to what kind of information is expected to be published, thus helping with inter-agency coordination and the appropriate allocation of resources. That said, it is advisable that developing States make necessary exemptions with respect to the publication of information on proposed measures which might be prejudicial to their political and financial autonomy. The significance of these exemptions will be dealt with in detail in this report under Subsection 1.1.5 below.

45. We have also observed that the choice of an explicit or implicit reference to the publication of proposed measures does not seem to have a bearing on the mandatory or hortatory nature of these commitments. Irrespective of whether an explicit or implicit reference is made, the frequent use of words and phrases, such as "may" and "shall endeavor", implies that the commitment in question is permissive and not mandatory in nature. In addition, the incorporation of clauses, such as "provide information in a reasonable period of time" or "in accordance with its [i.e., the State's] legal system"[26]

[26] See, e.g., New Zealand–United Kingdom FTA (2022), Art. 29.2.

gives contracting States an opportunity to further modulate their compliance with these commitments.

46. Insofar as the IIAs which contain a commitment to publish proposed measures are concerned, it appears that this commitment is linked to the commitment to provide interested persons with a right to comment.[27] Forty-eight of the forty-nine IIAs which have a commitment to publish proposed investment measures also include a right of interested persons or of the other contracting State(s) to comment on such measures. An example of such an incorporation can be seen in Art. 19.1(2) of the Canada–Republic of Korea FTA (2014).

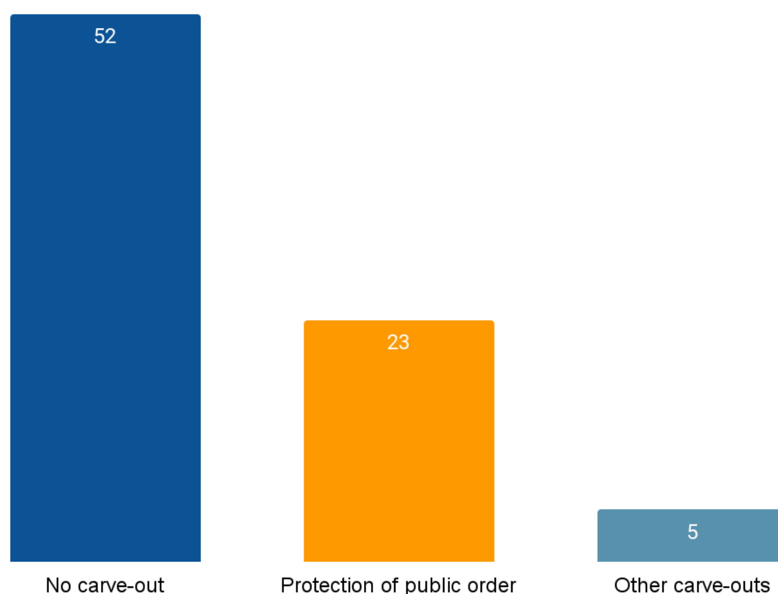
> **Canada–Republic of Korea FTA (2014)**
>
> **Article 19.1(2): Publication**
>
> To the extent possible, each Party shall:
> (a) publish in advance any such measure that it proposes to adopt; and
> (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.
>
> *[emphases added]*

1.1.5. Carve-outs from publication

47. Carve-outs serve as a limitation to the scope of obligations assumed by States. With respect to commitments of publication, carve-outs provide contracting States with the discretion to withhold the publication of measures of general application on certain grounds (**Figure 7**).

[27] See Subsection 1.2.1 below for further analysis.

Figure 7: Range of carve-outs from publication commitments (number of IIAs)



Source: Authors' mapping.

48. More than half of the IIAs under review (fifty-two IIAs) do not contain any carve-out with respect to the publication of investment measures. Of the twenty-eight IIAs that do contain such a carve-out, the most common type of carve-out, observed in twenty-three IIAs, relates to the protection of the public interest and the maintenance of public order.

49. In a mere five IIAs, contracting States have agreed to additional grounds for withholding publication beyond public order or the public interest. Such carve-outs are grounded on the premise of the confidentiality and sensitivity of information. Three of these IIAs have been concluded by the European Free Trade Association ("**EFTA**"). They use identical language to exempt the disclosure of confidential information from the publication of investment measures.[28] These include Art. 6 of the EFTA–Montenegro FTA (2011), Art. 1.6 of the EFTA–Ukraine FTA (2010), and Art. 6 of the Bosnia and Herzegovina–EFTA FTA (2015), all of which state as follows.

[28] These three IIA comprise a quarter of IIAs within the dataset that were concluded by the EFTA.

> 1. Each Party shall publish or otherwise make publicly available its laws, regulations, judicial decisions, administrative rulings of general application and the international agreements to which it is a party that may affect the operation of this Agreement.
>
> 2. A Party shall promptly respond to specific questions and provide, upon request, information to another Party on matters referred to in paragraph 1. The Parties are not required to disclose confidential information.
>
> *[emphases added]*

50. In addition, Art. 134(3) of the Kenya–United Kingdom EPA (2020) also provides for a carve-out from the publication of all measures under the IIA (including any international commitments) on the ground of the confidentiality of information that might impede law enforcement or prejudice commercial interests of particular enterprises. There is, however, an exception to this. Contracting States may not withhold the publication of such information if disclosure of it is mandated in the context of dispute settlement proceedings held under the IIA.

> **Kenya–United Kingdom EPA (2020)**
>
> **Article 134: Transparency and Confidentiality**
>
> 1. Each Party shall ensure that any laws, regulations, procedures and administrative rulings of general application as well as any international commitments relating to any trade matter covered by this Agreement are promptly published or made publicly available and brought to the attention of the other Party.
>
> [...]
>
> 3. Nothing in this Agreement shall require any Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private, except to the extent that it may be necessary to be disclosed in the context of a dispute settlement proceeding under Part VII of this Agreement. Where such disclosure is considered necessary by a panel established under Article 113 of Part VII the panel shall ensure that confidentiality is fully protected.
>
> *[emphases added]*

51. A rather unique example of a carve-out is included in Art. 69(3) of the Treaty on the Eurasian Economic Union (2014) which exempts draft laws (proposed measures) from publication not only to protect the public interest, but also in exceptional cases when a

prompt response from the host State is required or when publication may interfere with the further execution of the proposed measure(s) in question.

1.2. Commitments of engagement

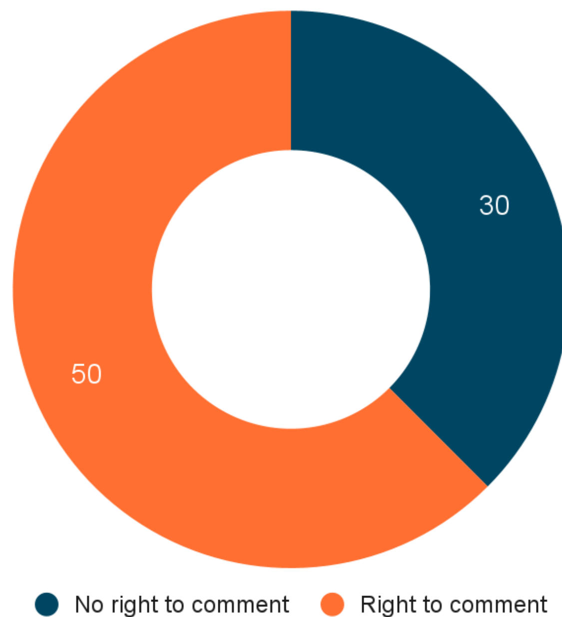
Key takeaways
Commitments of engagement direct each contracting State to provide the other contracting State(s) or any interested persons with a right to comment on published measures. They also create a duty for each contracting State to respond to inquiries received by the other contracting State(s) and any interested persons. Among the eighty IIAs with transparency provisions: ● Fifty provide for a right to comment. Within these fifty IIAs there were fifteen IIAs which had certain procedural requirements associated with the right to comment (i.e., strict timelines or a commitment to give due consideration to any comments received). ● Seventy-six provide for a duty to respond to inquiries received either from the other contracting State(s) only (sixty IIAs), from any interested persons only (one IIA) or from both the other contracting State(s) *and* any interested persons (fifteen IIAs). In operationalizing this duty, some IIAs direct States to make use of their existing administrative apparatus, while other IIAs direct States to establish a separate contact point instead. ● A small number of IIAs contain more expansive obligations, such as, among others, to resolve problems that arise out of proposed measures, to notify contracting States that would be impacted by proposed measures or to promote investment facilitation.

52. Commitments of engagement include two independent categories of commitments directed at States, that is, a commitment to provide a right of interested persons and the other contracting State(s) to comment on the publication of proposed measures, and a commitment to respond to inquiries received from interested persons or the other contracting State(s). Each category is examined in turn below.

1.2.1. Right to comment

53. A first type of a commitment of engagement provides for a reasonable opportunity for interested persons to comment on the proposed measures.[29] A majority of fifty IIAs in our dataset provide for a right of interested persons to comment (**Figure 8**). Among these IIAs, the structure and wording of the right to comment remains the same throughout, except for a few IIAs which will be discussed below.

Figure 8: Prevalence of the existence of right to comment (number of IIAs)



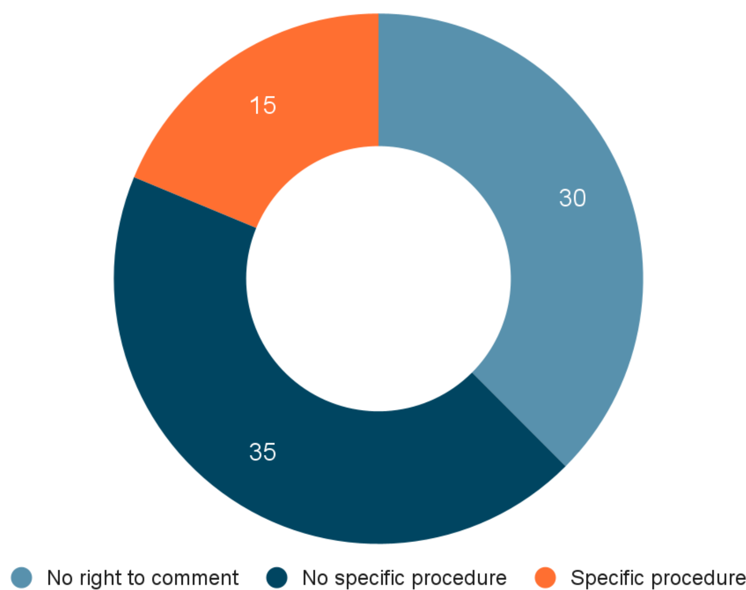
Source: Authors' mapping.

54. The provision of a right to comment tends to coexist with commitments to publish proposed investment measures, to which the right to comment is attached. By contrast, IIAs which only contain a general provision on transparency, as opposed to an entire chapter on transparency, tend not to include a right to comment. An example of this category includes the treaties entered by the EFTA. There were 12 such treaties in our

[29] See, e.g., Canada–Ukraine Modernized FTA (2023), Art. 15.2(2)(b).

dataset and all of them had a single provision on transparency with commitments of publication only.[30] The exception to this trend includes three IIAs which have a single provision on transparency but, nevertheless, provide interested persons with a right to comment.[31]

Figure 9: Variation of specific procedural requirements on the right to comment (number of IIAs)



Source: Authors' mapping.

55. Most of the IIAs reviewed do not contain any specific modalities and procedures on the manner in which the contracting States' duty to provide for a right to comment should be discharged. However, as **Figure 9** demonstrates, fifteen IIAs do provide for such modalities and procedures, which can take one of the following forms:

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[30] See, e.g., Ecuador–EFTA FTA (2018), Art. 1.6.

[31] See Australia–New Zealand Investment Protocol (2011), Art. 15(2)(a); China–Hong Kong CEPA Investment Agreement (2017), Art. 16(3)(ii); China–Japan–Republic of Korea Republic Trilateral Investment Agreement (2012), Art. 10(4)(b).

a. An obligation to provide for "sufficient time"[32] or a certain time period within which comments may be received, such as a period of no less than 30 calendar days;[33]

b. An obligation to consider the comments received. This provision is found in three out of the four association agreements entered by the EU with other States in the dataset,[34] as well as in Art. 12.8 of the China–Republic of Korea FTA (2015) and Art. 8(1)(4) of the Angola–EU SIFA (2023).

56. To comply with the commitment to provide for a specific time frame for comments on proposed measures, States may need to establish an administrative mechanism through which such comments should be sent in within the stipulated time period as well as a screening mechanism to exclude comments that were received beyond the stipulated period. Complying with this commitment may be more burdensome for States than complying with the more general commitment to provide "sufficient time" for comments.

57. On the flipside, compliance with an obligation to consider the comments received is not taxing on States as it is only a best-efforts duty, which does not require a State to actually take on board the comments received. Further, this obligation can be enforced through the existing administrative machinery of the States.

58. Overall, existing empirical data shows that providing stakeholders with an opportunity to comment on new draft regulations is one of the most widely implemented trade facilitation measures domestically by States.[35]

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[32] See, e.g., EU–Moldova Association Agreement (2014), Art. 357(1)(c) ("Each Party shall ensure that measures of general application: […] (c) allow for sufficient time between publication and entry into force of such measure except in duly justified cases.").

[33] See, e.g., EU–Kazakhstan EPCA (2015), Art. 171.

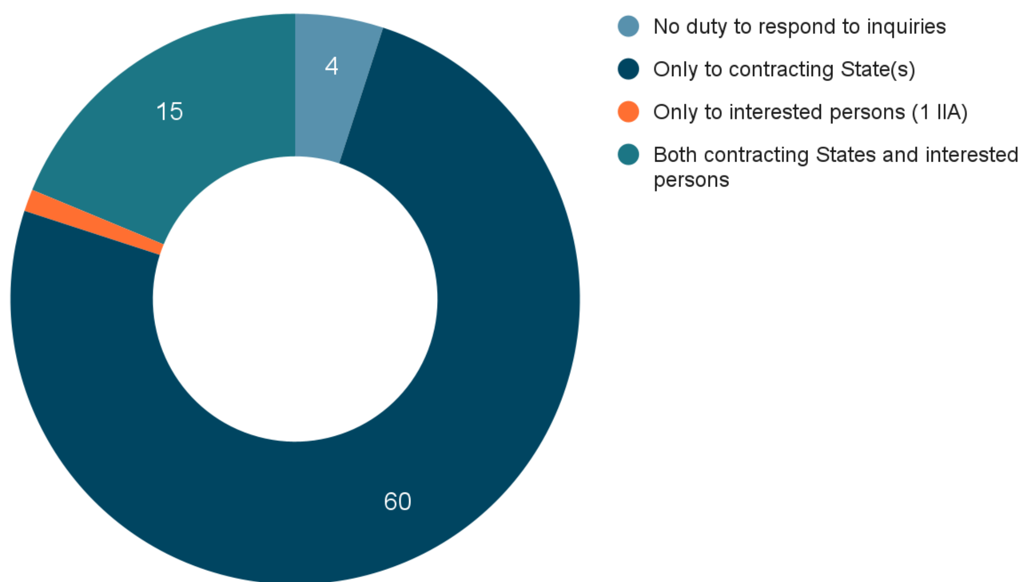
[34] See EU–Georgia Association Agreement (2014), Art. 221(2); EU–Moldova Association Agreement (2014), Art. 357(2)(c); EU–Ukraine Association Agreement (2014), Art. 283(2)(c).

[35] UN, *Digital and Sustainable Trade Facilitation: Global Report 2023 – Based on the United Nations Global Survey on Digital and Sustainable Trade Facilitation* (United Nations, 2023), 14. See also UNESCAP, *supra* n. 9, 5.

1.2.2. Response to inquiries

59. The second category of commitments of engagement direct each contracting State to respond to inquiries received by the other contracting State(s) or any interested persons with respect to any proposed or existing measures of general application.[36] There are clear differences among the IIAs reviewed on whether the duty to respond to inquiries is with respect to inquiries received by the contracting States, any interested persons, or both.

Figure 10: Prevalence of the commitment to respond to inquiries (number of IIAs)



Source: Authors' mapping.

60. As **Figure 10** shows, the overwhelming majority of the IIAs reviewed include a commitment to respond to inquiries — a mere four IIAs do not include such an obligation.[37] The prevailing approach among the IIAs that include a commitment to respond to inquiries, followed in sixty IIAs, is for this commitment to exist in relation to inquiries received only from the other contracting State(s). In fifteen IIAs the duty exists

[36] See, e.g., Canada–Ukraine Modernized FTA (2023), Art. 15.3(2).

[37] These four IIAs are the USMCA (2018), the Australia–Hong Kong Investment Agreement (2019), the ASEAN–Hong Kong Investment Agreement (2017), and the Chile–China FTA Investment Agreement (2012).

in relation to both contracting States and any interested persons. Only one IIA provides for the contracting States' duty to respond to inquiries submitted by any interested persons only.[38]

(a) Commitment to respond to inquiries from contracting States

61. The duty to respond to inquiries received by the other contracting State(s) is typically accompanied by the duty to clearly indicate a competent authority, official or contact point for receiving said inquiries. In so doing, some IIAs provide that the contact information of the "competent authorities responsible for [the State's] measures of general application" must be provided.[39] This drafting approach means that a State would have to designate multiple authorities as they may be responsible for different kinds of investment measures. In other IIAs, the same duty is part of a broader duty to establish a domestic contact point for any matters relating to the implementation of the IIA.[40]

62. Whereas the former drafting approach has the advantage of not having to set up a new agency to act as a contact point, it could have the disadvantage of varying levels of engagement and coordination depending on the authority that is responsible in each instance. This may be compounded in cases of complex measures that straddle multiple policy areas and thus domains of responsibility within government. By contrast, establishing a single contact point presents a more efficient and convenient approach compared to directing the inquiries to multiple authorities. That said, establishing a single contact point comes with its own challenges. It entails creating a new structure within government, comprising persons with prior expertise and experience in the field of investment law. Considering that developing States may already struggle to cope with low levels of domestic expertise and with meeting their existing administrative

[38] See Belarus–Kazakhstan–Russia Agreement on Services and Investment (2010), Art. 13(4).

[39] See, e.g., Japan–United Kingdom Comprehensive Economic Partnership Agreement ("**CEPA**") (2020), Art. 17.4(2) ("Each Party shall make easily available to the public the names and addresses of the competent authorities responsible for its measures of general application.").

[40] See, e.g., Republic of Korea–Viet Nam FTA (2015), Art. 17.4(2) ("Upon request of either Party, the contact point of the other Party shall indicate the office or official responsible for any matter relating to the implementation of this Agreement, and provide the required support to facilitate communications with the requesting Party. Each Party shall notify the other Party of any change in its contact point in due time.").

commitments, single contact points could face significant administrative and resource hurdles that may reduce their expected efficiency.

63. In addition to the above, our review has identified a number of IIAs which do include a duty to respond to inquiries but go a step further. We identify some of these IIAs below:

   a. The Armenia–EU CEPA (2017) obligates States to provide for specific (presumably domestic) procedures to address any problems that arise out of the implementation of measures of general application.[41] It is further clarified that this obligation is without prejudice to commitments to maintain domestic review and appeal mechanisms (see Subsection 1.3.2 below) contained in the same IIA.

   b. In addition to providing interested persons a right to comment, the Hong Kong–New Zealand CEPA (2010) provides for a specific time frame for responding to inquiries from other contracting States, that is, within 30 days of the receipt of such request.[42] We note that, in case a developing State receives a large number of inquiries, it might not be practically feasible to respond to each inquiry within 30 days of its receipt.

   c. The Australia–India Economic Cooperation and Trade Agreement ("**ECTA**") (2020) obligates contracting States to notify each other of measures that may affect the operation of the agreement or their interests.[43]

   d. The ECOWAS Common Investment Code (2019) mandates contracting States to provide information to each other that may support the facilitation of investments.[44]

[41] See Armenia–EU CEPA (2017), Art. 310(4) ("Each Party shall provide for procedures available to persons seeking a solution to problems that have arisen from the application of measures of general application under this Agreement.").

[42] See Hong Kong–New Zealand CEPA (2010), Art. 7(2) ("On request of the other Party, the requested Party shall within 30 days of receipt of the request provide information and respond to questions pertaining to any actual or proposed measure.").

[43] See Australia–India ECTA (2020), Art. 10.5(1) ("To the extent possible, each Party shall notify the other Party of any actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party's interests under this Agreement.").

[44] See ECOWAS Common Investment Code (2019), Art. 15(1)(b) ("A Member State shall provide to the other Member State aggregated information on foreign investment and investment opportunities in its territory with respect to origin, economic activities benefited, investment modalities and other information which may be available."). The same article also creates a carve-out from disclosing information that is confidential or prejudicial to public interest. This is unique because in other IIAs similar carve-outs were generally found only in association with publication commitments.

This mutual exchange of information may guide the ECOWAS States' policy decisions for foreign investment.

e. The New Zealand–United Kingdom FTA (2022) obligates contracting States to establish a contact point to provide information and respond to inquiries, but adds that contracting States can show compliance with this obligation through the notification provided to the WTO of measures that may affect other WTO members.[45] This drafting approach serves a dual purpose of enforcing compliance of contracting States to both their WTO obligations as well as those of the IIA. Developing States could benefit from this approach since they would not be expected to create a new administrative body merely for the sake of responding to inquiries under the IIA.

(b) Commitment to respond to inquiries from both contracting States and interested persons

64. Fifteen IIAs in the dataset oblige States to respond to inquiries not only from other contracting State(s) but also from "any person",[46] "interested persons",[47] or "investors".[48]

65. Most of these IIAs do not contain any further modalities as to how inquiries from interested persons should be treated. However, exceptionally, a few IIAs oblige States to maintain investment facilitation focal points through which communication with interested persons should be channeled. As a matter of illustration, the Angola–EU SIFA (2023) requires States to "maintain or establish appropriate investment facilitation focal points to serve as first points of contact for investors regarding measures affecting investment" and to ensure that such focal points "respond to inquiries from investors".[49]

[45] See New Zealand–United Kingdom FTA (2022), Art. 29.5.

[46] See EU–New Zealand FTA (2023), Art. 23.4(1); EU–United Kingdom Trade and Cooperation Agreement (2020), Art. 336(1); Moldova–United Kingdom Partnership, Trade and Cooperation Agreement, Art. 325(2); Armenia–EU CEPA (2017), Art. 310(3); EU–Georgia Association Agreement (2014), Art. 222(2); EU–Moldova Association Agreement (2014), Art. 358(2); Treaty on the Eurasian Economic Union (2014), Art. 69(5). See also Japan–United Kingdom CEPA (2020), Art. 17.4(3) (referring to "a person"); ASEAN–India Investment Agreement (2014), Art. 14(1)(b) (referring to a "natural and judicial person").

[47] See EU–Kazakhstan EPCA (2015), Art. 171(1); EU–Ukraine Association Agreement (2014), Art. 284(1); EU–Republic of Korea FTA (2010), Art. 12.4(1) (an "interested person" is defined in Art. 12.1 of the FTA as "any natural or legal person that may be subject to any rights or obligations under measures of general application").

[48] See Angola–EU SIFA (2023), Art. 22(1); ECOWAS Common Investment Code (2019), Art. 15(1)(c).

[49] Angola–EU SIFA (2023), Art. 22(1)–(2).

66. Another interesting example is the China–Republic of Korea FTA (2015), which obliges contracting States to designate contact points "to receive the complaints from investors of the other Party", "provide assistance in resolving difficulties" faced by investors as well as "provide advisory services" to the extent possible.[50] This commitment was included with a view of improving the investment environment and promoting investment in the territory of the contracting States. Notably, the Republic of Korea had a preexisting Foreign Investment Ombudsman mechanism prior to the signing of the above treaty, which was established in 1999.[51] China established a Foreign Investment Complaint Mechanism and enacted measures for processing complaints of foreign enterprises and investors more recently in 2022.[52]

1.3. Commitments of good governance

Key takeaways
Commitments of good governance direct contracting States to maintain the impartial administration of measures of general application, establish domestic review or appeal mechanisms and provide a reasonable opportunity to be heard in administrative proceedings. Among the eighty IIAs with transparency provisions: ● Fifty-three include provisions on impartial administration. ● Within those, fifty-two IIAs provide for the establishment of a domestic review or appeal mechanism and for a reasonable opportunity to be heard in administrative proceedings. The single exception is the Angola–EU SIFA (2023). The commitment to provide for a review or appeal mechanisms and reasonable opportunity to be heard in administrative proceedings may be regarded as lower-cost to implement, to the

[50] See China–Republic of Korea FTA (2015), Art. 12.19.

[51] See InvestKOREA, "Foreign Investment Ombudsman", available at: https://www.investkorea.org/ik-en/cntnts/i-450/web.do.

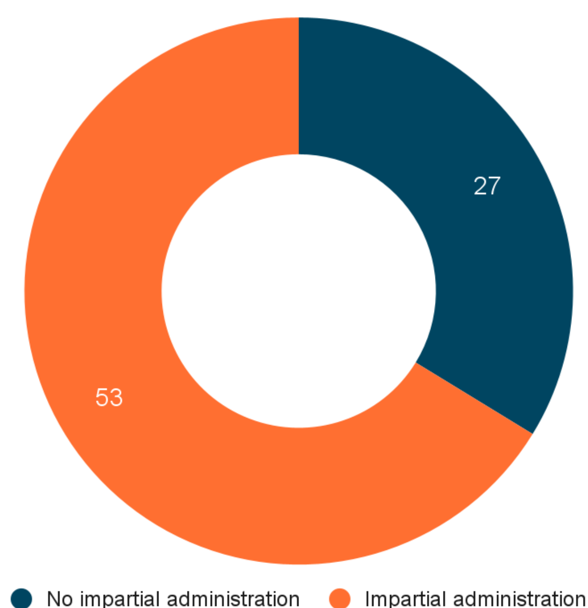
[52] Hannah C. L. Ha, "China's New Foreign Investment Complaint Mechanism – A Sign of Commitment to Protect and Attract Foreign Investment?" (6 April 2020), available at: https://www.mayerbrown.com/en/insights/publications/2020/04/chinas-new-foreign-investment-complaint-mechanism-a-sign-of-commitment-to-protect-and-attract-foreign-investments.

extent that contracting States have an existing mechanism already in place and a robust system of public administration.

67. The fourth type of transparency commitments are commitments of good governance. Commitments of good governance include two broad categories of obligations, that is, an obligation to ensure the impartial administration of measures of general application and an obligation to maintain a domestic review or appeal mechanism and to provide a reasonable opportunity to be heard in administrative proceedings. Each of these categories is examined in turn below.

1.3.1. Impartial administration of measures of general application

Figure 11: Prevalence of commitment to maintain an impartial administration of measures of general application (number of IIAs)



Source: Authors' mapping.

68. Among the eighty IIAs with transparency provisions analyzed, fifty-three IIAs mention the impartial administration of measures of general application (**Figure 11**). An example of this type of provision can be seen in Art. 25.3 of the Australia–Peru FTA (2018).

> **Australia–Peru FTA (2018)**
>
> **Article 25.3: Administrative Proceedings**
>
> With a view to administering in a consistent, impartial and reasonable manner all measures of general application with respect to any matter covered by this Agreement, each Party shall ensure in its administrative proceedings applying measures referred to in Article 25.2.1 to a particular person, good or service of the other Party in specific cases that:
>
> [...]
>
> *[emphases added]*

69. Provisions of the above type are mostly found in treaties with a separate chapter dedicated to transparency, although there were certain "outlier" instances of treaties which did not have this commitment despite there being a dedicated transparency chapter. The ECOWAS Common Investment Code (2019) is one such treaty with a chapter on transparency (and provisions on anti-corruption), but without any commitment on impartial administration.[53] It is observed that the contracting States in all these "outlier" treaties are either developing States or small island developing States. The intentional exclusion of this commitment may be attributed to the challenges faced by these States in combating unfair practices to provide an effective and impartial administration.

70. The remaining twenty-seven IIAs which do not include a commitment to ensure the impartial administration of measures tend to only have a single provision on transparency,[54] although, one outlier case was identified here too.[55]

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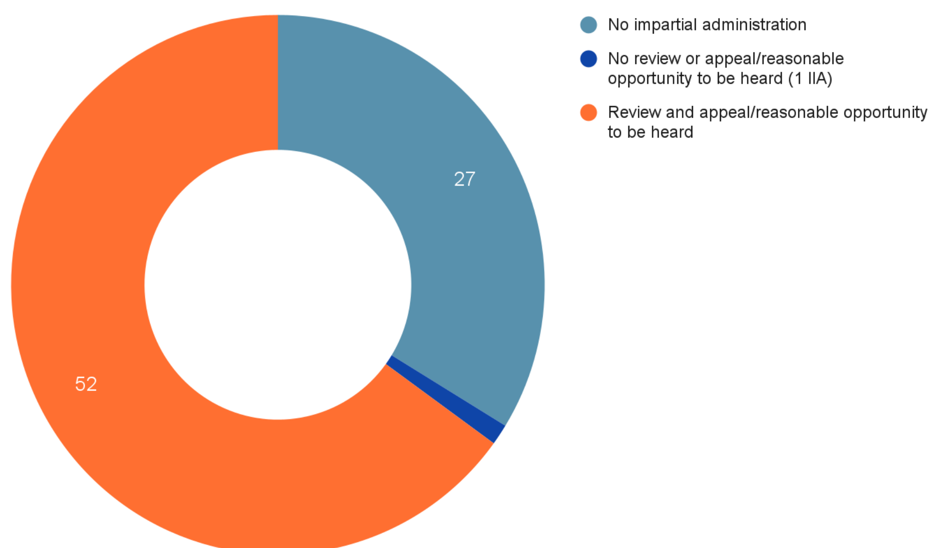
[53] For additional examples, see the EFTA–Peru FTA (2010), the Belarus–Kazakhstan–Russia Agreement on Services and Investment (2010), the EU–Kazakhstan EPCA (2015), the China–Georgia FTA (2017), and PACER Plus (2017).

[54] We note that this trend is similar to the trend observed in Subsection 1.2.1 above, wherein treaties that only had a single provision on transparency did not have a right to comment, whereas treaties that had a full chapter on transparency did.

[55] See Australia–New Zealand Investment Protocol (2011), Art. 15(3)–(5). This provision has only a provision on transparency, yet it provides for the impartial administration of measures of general application.

1.3.2. Review/appeal mechanism and reasonable opportunity to be heard

Figure 12: Prevalence of commitment to establish a review or appeal mechanism and to provide a reasonable opportunity to be heard (number of IIAs)



Source: Authors' mapping.

71. The commitment to maintain administrative review or appeal mechanisms is a corollary to the commitment to ensure the impartial administration of measures of general application. Indeed, fifty-two out of the fifty-three IIAs which provided for the latter commitment also contain a commitment to maintain appeal or review mechanisms (**Figure 12**). The Angola–EU SIFA (2023) is notable as the only treaty in the dataset which has a commitment to maintain impartial administration but does not contain any further commitment to maintain an administrative review or appeal mechanism.

72. Providing an opportunity to be heard in administrative proceedings is an integral part of the commitment to provide for mechanisms for administrative review or appeal. Indeed, all fifty-two of the IIAs in the dataset that had the latter commitment also had a commitment to provide an opportunity to be heard in administrative proceedings. These two commitments are always found in conjunction under the same IIA provision, which explains the similarity of the trends under both of them.

73. An example provision is quoted below from the Australia–India ECTA (2022).

> **Australia–India ECTA (2022)**
>
> **Article 10.4. Review and Appeal**
>
> 1. Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals, or procedures for the purpose of the prompt review and, where warranted correction of final administrative actions regarding matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.
>
> 2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceedings are provided with the right to:
>
> (a) reasonable opportunity to support or defend their respective positions; and
>
> (b) a decision based on the evidence and submissions of record.
>
> *[emphases added]*

74. The commitment to provide for a domestic review or appeal mechanism and a reasonable opportunity to be heard may be regarded as lower-cost to implement, to the extent that contracting States have an existing mechanism already in place and a robust system of public administration.[56] Disproportionate human resource constraints could mean that small island developing States and least developed States may find it burdensome to establish such administrative mechanisms.

[56] According to existing empirical data, providing for an "independent appeal mechanism" is one of the most implemented trade facilitation measures domestically by States. See UN Global Report 2023, *supra* n. 35, 22.

1.4. Dispute settlement for transparency commitments

1.4.1. State-State dispute settlement

Key takeaways

Among the eighty IIAs with transparency provisions:

- The overwhelming majority (seventy-eight IIAs) provide for binding SSDS. In the two remaining IIAs (China–Hong Kong CEPA Investment Agreement (2017) and Australia–New Zealand Investment Protocol (2011)), the absence of binding SSDS provisions may be explained by these States' intention to enhance cooperative dispute resolution mechanisms in their relations.
- All but one of the IIAs provide for the advance consent of contracting States to SSDS. The exception is the Angola–EU SIFA (2023), which requires consent on a case-by-case basis. This is an illustration of an emerging trend to exclude investment facilitation features from formal dispute settlement. In line with this emerging trend, two other IIAs (Cambodia–Republic of Korea FTA (2021) and Hong Kong–New Zealand CEPA (2010)) exclude from the scope of SSDS the States' commitment to cooperate on matters relating to transparency.
- The majority of IIAs that subject transparency commitments to binding SSDS provide for international arbitration. One IIA in the dataset — the Canada–Ukraine Modernized FTA (2023) — contains specific rules applicable to disputes over transparency commitments. These rules encourage the more active cooperation of States and require arbitrators to have relevant expertise.
- The majority of IIAs establish multi-tiered dispute resolution mechanisms requiring States to negotiate first and, in some instances, to resort to institutionalized dispute avoidance procedures established under the IIA. Further, these IIAs usually provide for other alternative dispute resolution procedures, such as mediation or conciliation, that can be used at any time.
- Given that the GATT 1994, GATS, and TRIPS also provide for transparency commitments, there is a possibility of conflict of jurisdiction between the WTO

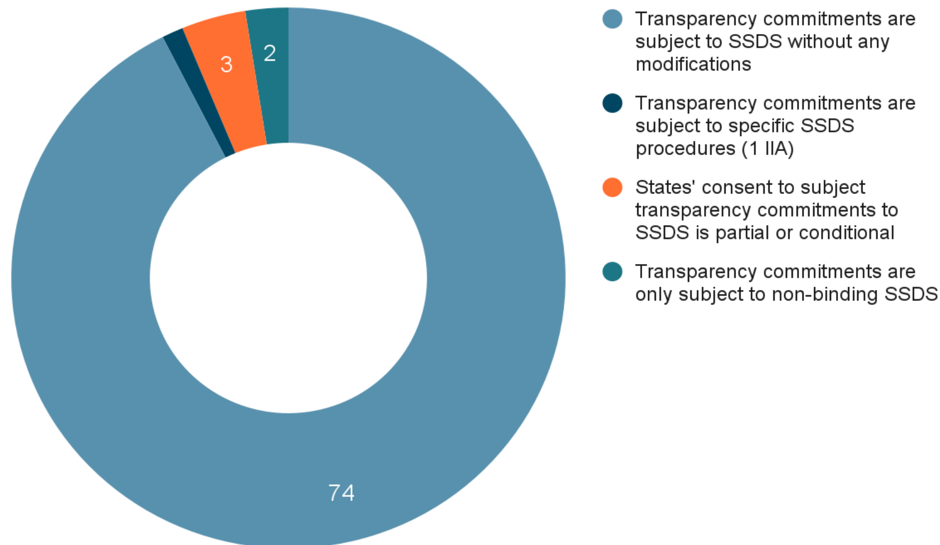
system and dispute settlement mechanisms established under IIAs. To address this risk, most IIAs in the dataset include a choice of forum clause prohibiting contracting States from initiating disputes arising out of overlapping commitments in two fora. At the same time, to ensure consistent application of such overlapping commitments, most IIAs in the dataset require arbitrators to take into account interpretations already given in WTO panel and Appellate Body reports.

75. Provisions regulating the settlement of disputes among contracting States are an aspect of all treaties, including all eighty of the IIAs with transparency provisions under review. As long as an IIA contains dispute settlement provisions, it is presumed that these apply to all substantive provisions of the IIA including transparency commitments. Accordingly, in all IIAs in the dataset a disagreement as to the interpretation or application of transparency commitments can be the basis of a dispute between the contracting States and, in the majority of IIAs, this is without any modifications, special conditions or caveats attached.

76. A minority of six IIAs, however, contain such modifications, special conditions, and caveats. In particular: in three IIAs the States' consent to SSDS is either partial or conditional; two IIAs provide that disputes arising out of transparency commitments can be resolved only through non-binding dispute resolution methods; one IIA provides for a specific dispute settlement mechanism for the resolution of disputes arising out of transparency commitments (**Figure 13**).

77. These variations are discussed in the subsections below addressing, first, the States' consent to resolve disputes arising out of transparency commitments through binding SSDS and, second, the procedures applicable to such disputes. The last subsection addresses how SSDS provisions included in the IIAs under review coexist with the WTO dispute settlement framework.

Figure 13: Availability of State-State dispute settlement (SSDS) for transparency commitments (number of IIAs)



Source: Authors' mapping.

(a) States' consent to resolve disputes arising out of transparency commitments through binding SSDS

78. In the majority of IIAs in the dataset (seventy-five IIAs), contracting States have consented to resolve all disputes arising out of transparency commitments included in the IIAs through general or specific binding SSDS procedures. However, in five IIAs contracting States excluded transparency commitments from the scope of binding SSDS either partially or in full.

79. Excluding IIA provisions aimed at trade and investment facilitation, including those on transparency, "from formal dispute settlement" between the contracting States is an emerging trend in recent IIAs with trade and investment facilitation features.[57] According

[57] UNCTAD, "Investment Facilitation in International Investment Agreements: Trends and Policy Options", IIA Issues Note, Issue 3 (September 2023), 10–11.

to UNCTAD, this approach is “aligned with the facilitation commitments’ forward-looking nature, aimed at fostering continued engagement”.[58]

80. Among the IIAs in the dataset, the Angola–EU SIFA (2023) offers one of the clearest illustrations of this approach. This IIA provides for binding dispute settlement but reserves the parties’ consent to inter-State arbitration, so that consent needs to be given separately on a case-by-case basis.

> **Angola–EU SIFA (2023)**
>
> **Article 37: Mutually agreed solutions**
>
> [...]
>
> 4. If the Parties are unable to reach a mutually agreed solution within 120 days of the date of the request for consultations, or where the mutually agreed solution is not implemented within the time period referred to in paragraph 2, the Party that requested consultations under Article 36 may request to resort to State-to-State arbitration to resolve the dispute. The Party to which the request for arbitration is made shall accept or reject that request within 30 days of the date of the request. In the absence of a response, the request shall be deemed to have been rejected.
>
> *[emphases added]*

81. Further, in two out of eighty IIAs under review — the Cambodia–Republic of Korea FTA (2021) and the Hong–New Zealand CEPA (2010) — one article from the transparency chapter is excluded from SSDS.

82. In the case of the Cambodia–Republic of Korea FTA (2021), this is the article on cooperation on “promoting increased transparency and combatting corruption”, which does not impose any firm substantive obligations upon the contracting States.

> **Cambodia–Republic of Korea FTA (2021)**
>
> **Article 7.6: Cooperation on Promoting Increased Transparency and Combating Corruption**
>
> 1. The Parties agree to cooperate in bilateral ways to promote transparency in respect of international trade and investment
>
> 2. The Parties affirm their resolve to combat bribery and corruption in international trade and investment in accordance with its applicable laws and regulations.

[58] Ibid., 10.

3. The Parties, subscribing to the principles of good administrative behavior, agree to cooperate in promoting regulatory quality and performance, including through exchange of information and best practices on their respective policies and regulations.

Article 8.3: Scope [of SSDS]

[...]

2. This Chapter shall not apply to Chapter Six (Economic Cooperation), Section B (Anti-Dumping and Countervailing Duties) in Chapter Five (Trade Remedies), Article 2.15 (Sanitary and Phytosanitary Measures) and Article 7.6 (Cooperation on Promoting Increased Transparency and Combating Corruption), and Annex 3-B (Treatment for Certain Goods).

[emphases added]

83. In the case of the Hong Kong–New Zealand CEPA (2010) the exclusion pertains to the contracting States' commitment to make available information on actual and proposed business laws and to give each other an opportunity to comment on them, where appropriate.

Hong Kong–New Zealand CEPA (2010)

Article 3: Cooperation on Business Law

1. Notwithstanding other provisions in this Chapter, the Parties agree to:

(a) make available information on their respective business laws, including, where appropriate, on proposed and actual amendments to their business laws;

(b) provide each other, where appropriate, with a reasonable opportunity to comment on proposed new business laws or proposed amendments to existing business laws; and

(c) encourage cooperation between their relevant regulatory authorities in the area of business law.

2. For the purposes of this Article, the term "business law" means domestic law of a Party which relates to security markets, insurance markets, insolvency, corporate governance or other similar business activities.

3. Neither Party shall have recourse to any dispute settlement procedures under this Agreement in respect of any issue arising from or relating to this Article.

[emphases added]

84. Other commitments of publication and engagement provided in the Hong Kong–New Zealand CEPA (2010) are not excluded from the scope of SSDS. Hence, this carve-out may be explained by the fact that the term "business law" is capacious enough to cover

almost all domestic legal acts regulating business activities and can thus place a heavy implementation burden on States.

85. Finally, two out of the eighty IIAs with transparency provisions in the dataset — the China–Hong Kong CEPA Investment Agreement (2017) and the Australia–New Zealand Investment Protocol (2011) — are noteworthy in that they contain only non-binding dispute settlement procedures.[59] This means that, in both IIAs, disputes arising out of the interpretation or application of transparency commitments are to be resolved exclusively through consultations.

86. The China–Hong Kong CEPA Investment Agreement (2017) is a unique IIA as Hong Kong is a special administrative region ("**SAR**") of China. Relations between Mainland China and Hong Kong SAR are characterized by the principle of "One Country, Two Systems", which calls for "deeper and broader" cooperation.[60] Further, both territories have "an almost identical cultural environment [...] show[ing] a preference for the avoidance of conflict in the interest of social harmony".[61] This political and cultural context may help to explain why IIAs concluded by these two "systems" resort to cooperative mechanisms instead of adversarial binding dispute settlement.[62]

87. As for the Australia–New Zealand Investment Protocol (2011), the absence of the binding SSDS in this IIA is likely explained by the fact that Australia and New Zealand are neighboring States seeking to maintain good relations. In its National Interest Analysis, New Zealand explained the absence of "a formal dispute settlement mechanism" in its agreements with Australia by "the high level of dialogue between Ministers and officials on both sides of the Tasman".[63]

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[59] China–Hong Kong CEPA Investment Agreement (2017), Art. 18; Australia–New Zealand Investment Protocol (2011), Art. 25.

[60] See White Paper on "The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region" (2014).

[61] Gonzalo Villalta Puig, "Quasi-adjudicative Dispute Settlement Mechanism for CEPA: The Rule of Law in Trade Relations between Mainland China and Hong Kong" (2013) 12(2) Chinese Journal of International Law 281, 305.

[62] Ibid. To note, the China–Hong Kong CEPA (2003) also lacks any binding dispute settlement procedure.

[63] New Zealand Ministry of Foreign Affairs and Trade, "Protocol on Investment to the New Zealand–Australia Closer Economic Relations Trade Agreement. National Interest Analysis", 25.

88. It is notable that four out of the five IIAs where contracting States did not provide their consent to binding dispute settlement, or modified their consent with respect to transparency commitments, were concluded by countries from the Asia-Pacific region.

(b) Procedures applicable to disputes arising out of transparency commitments

89. The overwhelming majority of IIAs that subject transparency commitments to binding SSDS provide for international arbitration, either expressly or by incorporation from other agreements.[64] Exceptionally, a few IIAs provide either for a quasi-judicial procedure identical to the WTO dispute settlement system[65] or for regional international courts[66] as the binding dispute resolution fora.

90. Procedural rules governing State-State arbitration vary from IIA to IIA. In very few IIAs have contracting States followed the "traditional" arbitration model selected already existing arbitration rules to govern the procedure.[67] Rather, in the majority of IIAs, contracting States have resorted to the so-called "panel procedure" with tailor-made procedural rules that in some aspects "resemble a quasi-judicial mechanism".[68] In most of the IIAs under review the rules of such panel procedure share the following features:[69]

[64] Four IIAs under review incorporate SSDS provisions from other related agreements. See Australia–Hong Kong Investment Agreement (2019), Art. 22 (referring to the Australia–Hong Kong FTA (2019)); ASEAN–Hong Kong Investment Agreement (2017), Art. 21 (referring to the ASEAN–Hong Kong FTA (2017)); ASEAN–India Investment Agreement (2014), Art. 19 (referring to the ASEAN–India Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation (2009)); Chile–China FTA Investment Agreement (2012), Art. 26 (referring to the Chile–China FTA (2005)).

[65] The Agreement Establishing the African Continental Free Trade Area ("**AfCFTA**") (2018) establishes the Dispute Settlement Body that has the authority to "establish Dispute Settlement Panels and an Appellate Body" and adopt their reports. See AfCFTA (2018), Protocol on Rules and Procedures on the Settlement of Disputes.

[66] For example, disputes arising out of the Treaty on the Eurasian Economic Union (2014) and the Belarus–Kazakhstan–Russia Agreement on Services and Investment (2010) can be referred to the Court of the Eurasian Economic Union. See Treaty on the Eurasian Economic Union (2014), Art. 112; Belarus–Kazakhstan–Russia Agreement on Services and Investment (2010), Art. 24. Also, under the ECOWAS Common Investment Code (2019), contracting States can refer their disputes to the ECOWAS Community Court of Justice, if any other dispute resolution method fails. See ECOWAS Common Investment Code (2019), Art. 53(4).

[67] See, e.g., EFTA–Moldova FTA (2023) (selecting the PCA Arbitration Rules); China–Japan–Republic of Korea Trilateral Investment Agreement (2012) (selecting the UNCITRAL Arbitration Rules); EFTA–Montenegro FTA (2011) and EFTA–Ukraine FTA (2010) (both selecting the PCA Optional Rules).

[68] On the distinction between "traditional" model and "panel procedure", see Nathalie Bernasconi-Osterwalder, "State–State Dispute Settlement in Investment Treaties: Best Practices Series – October 2014" (IISD, October 2014), 3–4.

[69] See, e.g., Canada–Ukraine Modernized FTA (2023), Ch. 28, Section A; Central America–Republic of Korea FTA (2018), Ch. 22; Malaysia–Turkey FTA (2014), Ch. 12; Costa Rica–Singapore FTA (2010), Ch. 17.

a. Panels have to consist of three panelists, who are explicitly required to have expertise in international trade or other matters covered by each IIA, comply with certain ethical obligations established under each IIA and be independent.

b. The rules of procedure are set out in each IIA.

c. Before rendering a final decision, panels should issue an interim report giving the disputing States an opportunity to submit their comments thereto.

d. Panels may have to reconvene if compliance with the final report is at issue.

91. One IIA — the Canada–Ukraine Modernized FTA (2023) — establishes a specific dispute settlement procedure for transparency, anti-corruption and responsible business conduct commitments in a separate annex.[70] This annex has, *inter alia*, the following deviations from the general SSDS procedural rules:

a. Consultations preceding any binding dispute settlement may take place at the cabinet level at the request of one of the disputing States.[71]

b. Panelists shall "be chosen on the basis of [their] expertise in anti-corruption matters or other appropriate disciplines".[72]

c. If a violation of a transparency commitment is found, panels shall provide the disputing States with "recommendations for the resolution of the matter"[73] and these States "may decide on a mutually satisfactory action plan to implement the [p]anel's recommendations", which shall be "made publicly available by either Party".[74]

92. These deviations in the Canada–Ukraine Modernized FTA (2023) are aimed at a more efficient resolution of disputes arising out of transparency and anti-corruption commitments and at the enhancement of the disputing States' cooperation on these matters.

[70] Canada–Ukraine Modernized FTA (2023), Annex 28-B.

[71] Ibid., para. 2.

[72] Ibid., para. 8(a).

[73] Ibid., para. 14.

[74] Ibid., para. 6.

93. Exceptionally, one IIA — the ECOWAS Common Investment Code (2019) — does not provide States with an open choice with respect to the arbitration forum. Instead, it only offers encouragement to use national or regional institutions.

> **ECOWAS Common Investment Code (2019)**
>
> **Article 53: State–State [dispute settlement]**
>
> [...]
>
> (3) Where recourse is made to arbitration, the arbitration may be conducted at any established public or private alternative dispute resolution centres or the arbitration division of the ECOWAS Community Court of Justice. Member States are encouraged to utilise regional and national alternatives dispute settlement institutions.
>
> [...]

94. It is also worth noting that, in all IIAs in the dataset, contracting States can resort to binding dispute settlement only after negotiations or consultations between them have failed. Exceptionally, some of the IIAs under review also establish a second tier of dispute resolution by making contracting States resort to institutionalized dispute avoidance procedures.[75] For example, under the USMCA (2018), upon failure of consultations, the disputing States can request a meeting of the Free Trade Commission which is empowered to assist them in reaching a "mutually satisfactory resolution of the dispute" by calling on technical advisors, creating working or expert groups, and making recommendations.[76]

95. Apart from that, most IIAs provide for other forms of alternative dispute resolution, such as good offices, conciliation, or mediation, and allow States to use them "at any time", even after arbitration has been initiated.[77] This move "away from litigation" and "towards more cooperative mechanisms" is also one of the trends of recent IIAs, especially those containing trade facilitation features.[78]

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[75] See, e.g., Israel–Republic of Korea FTA (2021), Art. 20.5; USMCA (2018), Art. 31.5(1)–(3).

[76] USMCA (2018), Art. 31.5(1)–(3).

[77] See, e.g., Pacific Alliance–Singapore FTA (2022), Art. 23.7.

[78] See UNCTAD, *supra* n. 57, 11.

(c) Possible conflict of jurisdiction between the dispute resolution mechanism under IIAs and the WTO dispute settlement framework

96. Disputes over certain transparency commitments in theory can also be resolved by the WTO Dispute Settlement Body ("**DSB**"). This is because, as was discussed above,[79] Art. X of the GATT 1994, Art. III of the GATS, and Art. 63 of the TRIPS, which are an integral part of the WTO Agreement[80] and covered by the WTO dispute settlement system,[81] contain substantially equivalent transparency commitments as most of the IIAs in the dataset. In particular, they oblige States to promptly publish their laws and regulations, judicial decisions and administrative rulings of general application.[82] GATT 1994 also requires administration of measures to be made "in a uniform, impartial and reasonable manner".[83] Some of the IIAs under review even explicitly incorporate these articles into their transparency chapters[84] or refer to them therein.[85]

97. This creates a possible conflict of jurisdiction over such overlapping commitments between dispute resolution fora provided for in IIAs and the DSB. Most IIAs attempt to resolve this possible conflict by giving their contracting States the choice to resort either to the WTO dispute settlement system or to the dispute settlement system established under the IIA and by precluding them from initiating identical disputes in different fora.[86]

EU–New Zealand FTA (2023)

Article 26.24: Choice of forum

1. If a dispute arises regarding a particular measure in alleged breach of the covered provisions and a substantially equivalent obligation under any other international trade agreement to which both Parties

[79] See paras. 23–25 above.

[80] WTO Agreement, Art. II(2), Annexes 1A and 1B.

[81] WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Art. 1.

[82] GATT 1994, Art. X(1). See also GATS, Art. III(1); TRIPS, Art. 63(1).

[83] GATT 1994, Art. X(3).

[84] See, e.g., Georgia–Hong Kong FTA (2018), Ch. 14, Art. 3.

[85] See, e.g., EU–Kazakhstan EPCA (2015), Art. 171.

[86] This is called the "*lis alibi pendens* approach" in the literature. See Henry Gao and Chin Leng Lim, "Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes" (2008) 11(4) Journal of International Economic Law 899, 907.

are party, including the WTO Agreement, the Party seeking redress shall select the forum in which to settle the dispute.

2. Once a Party has selected the forum and initiated dispute settlement procedures under this Section or under any other international trade agreement, that Party shall not initiate dispute settlement procedures under any other agreement with respect to the particular measure referred to in paragraph 1, unless the forum selected first fails to make findings for procedural or jurisdictional reasons.

[...]

[emphases added]

98. In the absence of such an explicit clarification, jurisdiction of both the DSB and a dispute resolution forum provided in an IIA may be called into question if a dispute over such overlapping commitments is brought before them.[87] This uncertainty may create additional procedural hurdles to the disputing States, result in duplicating proceedings and hence increase costs.

99. However, it bears noting that to date this risk has been rather theoretical. SSDS provisions of IIAs have been very rarely invoked.[88] Moreover, there are no known cases where States initiated disputes over transparency commitments included in the IIAs. In contrast, "transparency requirements under WTO law have been actively enforced under the [WTO] dispute settlement understanding."[89] Although the WTO dispute settlement system at the moment suffers from a legitimacy crisis and the WTO Appellate Body has been paralyzed for several years,[90] WTO member States still use the system.[91] Notably,

[87] It is argued that, under Art. 23 of the WTO Dispute Settlement Understanding, the DSB has exclusive jurisdiction over the disputes arising out of the WTO Agreement. However, "the exclusivity of WTO jurisdiction may be called into question in situations involving [...] an exclusive forum selection clause choosing the RTA as the exclusive forum for all disputes or a certain class of disputes". This may create real conflict of jurisdiction between two fora. See ibid., 907.

[88] Generally, see Nathalie Bernasconi-Osterwalder, *supra* n. 68, 1–2. Since 2014, there appears to have been only one inter-State dispute initiated under an IIA, i.e., *Republic of Azerbaijan v. Republic of Armenia* (PCA Case No. 2023-65), which was commenced under the Energy Charter Treaty (1994).

[89] Kinda Mohamadieh, "Intervention at UNCTAD IIA expert meeting 2019. Session on: Promoting and Facilitating Investment and the WTO Structured Discussions on Investment Facilitation" (13 November 2019), available at: https://investmentpolicy.unctad.org/.

[90] Generally, see Bernard M. Hoekman and Petros C. Mavroidis, "Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?" (2021) 32(3) European Journal of International Law 743, 743–744.

[91] From 2019 to 2022, 41 requests for consultations were made and 29 panels were established. Although these numbers are generally lower than in the period before 2019, they demonstrate that the system is still operational. See WTO, "Dispute Settlement Activity — Some Figures", available at: https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

out of forty-nine requests for consultations made from 2019 to 2024, eighteen requests (approximately 37%) referred to WTO transparency commitments, mostly under the GATT 1994.[92] Panel reports have been issued in three such disputes.[93]

100. In fact, there is now a sufficient body of WTO panel and Appellate Body reports interpreting WTO transparency commitments.[94] That is why, to ensure consistency of interpretation of substantially equivalent commitments included in IIAs, more than half of the IIAs under review oblige arbitral tribunals or panels constituted under these IIAs to take into account relevant interpretations already made in the WTO framework, including with respect to transparency commitments.

EU–New Zealand FTA (2023)

Article 26.22: Rules of interpretation

[...]

2. The panel shall also take into account relevant interpretations in reports of WTO panels and the Appellate Body adopted by the Dispute Settlement Body of the WTO.

[...]

101. The inclusion of such a clause is beneficial as it ensures predictability of interpretation of States' transparency commitments, which are identical to the ones incorporated in the WTO Agreement, if the dispute is not brought before the DSB.

1.4.2. Investor-State dispute settlement

Key takeaways
Among the eighty IIAs with transparency provisions:

[92] See WTO, "Chronological List of Disputes Cases", available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

[93] See, e.g., *European Union and Certain Member States — Certain Measures Concerning Palm Oil and Oil Palm Crop-based Biofuels*, WT/DS600/R, Report of the Panel, 5 March 2024, Section 7.1.5.4 (finding a breach of Art. X:3(a) of the GATT 1994 on reasonable and impartial administration).

[94] See, e.g., WTO, "Article X of the GATT 1994 – Scope and Application. Note by the Secretariat" G/C/W/374 (14 May 2002).

- More than half do not provide for ISDS at all, either because the IIA is not of an investment protection nature or because the contracting States have made a deliberate decision not to include ISDS provisions.
- Transparency commitments are very rarely subject to ISDS even among those IIAs that do provide for ISDS. This is the case for only five out of the eighty IIAs in the dataset.

Nevertheless, even where transparency commitments are not formally subject to ISDS, investors may try to use these commitments as relevant context in relation to an allegation of a breach of the FET standard by the State concerned. This can be especially problematic for developing and least developed countries because lack of transparency may be a direct consequence of their resource constraints.

Contracting States can seek to minimize this risk by clarifying the scope of the FET provision and by including so-called "firewall provisions" in their IIAs aimed at insulating investment facilitation commitments from ISDS mechanisms.

102. More than half of the IIAs in our dataset (forty-six out of eighty IIAs) do not provide for ISDS at all. In some cases, this is because those IIAs are not traditional investment protection agreements but rather investment facilitation agreements or association agreements. In other cases, contracting States have made a deliberate decision not to include ISDS provisions even though the IIAs in question do provide for investment protection. This is true, for example, for the IIAs concluded by the United Kingdom,[95] the EU[96] and the EFTA States,[97] as well as some of the IIAs concluded by Malaysia,[98]

[95] See, e.g., New Zealand–United Kingdom FTA (2022); Australia–United Kingdom FTA (2021); Iceland–Liechtenstein–Norway–United Kingdom FTA (2021); Moldova–United Kingdom Partnership, Trade and Cooperation Agreement (2020). Although the United Kingdom's position towards ISDS is not entirely clear, there are certain indications that the United Kingdom may not be entirely favorable to ISDS. See, e.g., International Trade Committee of House of Commons, "UK Investment Policy. Seventh Report of Session 2017–19" (24 July 2019), paras. 65–66.

[96] See, e.g., EU–New Zealand FTA (2023); Colombia–Ecuador–EU–Peru Trade Agreement (2012); EU–Republic of Korea FTA (2010). The EU is a strong opponent of the ISDS system in its current form of ad hoc arbitration by party-appointed arbitrators.

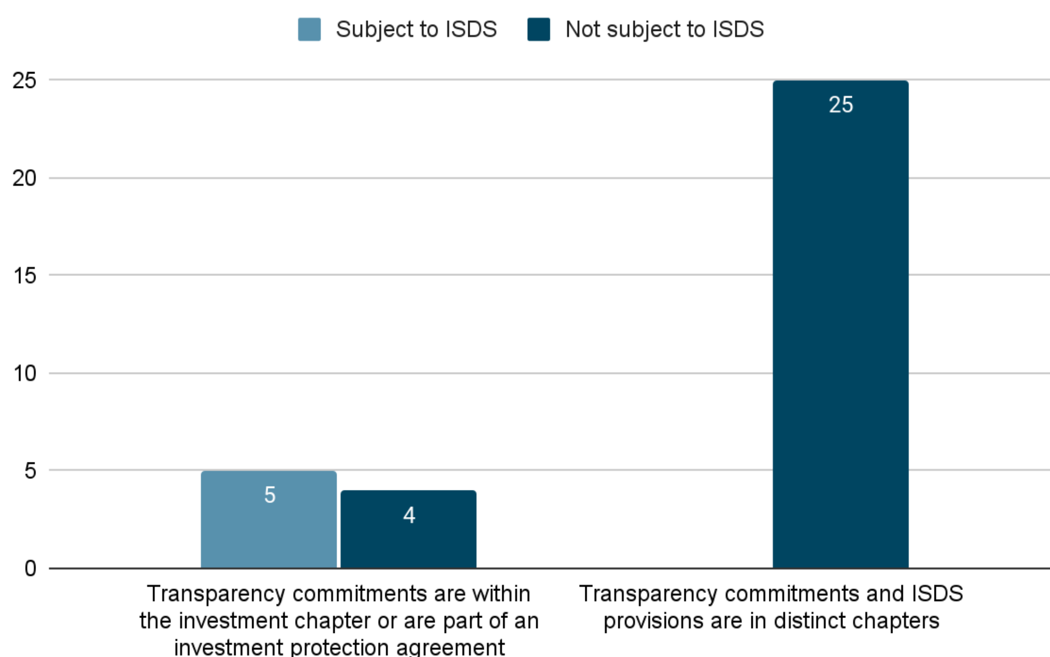
[97] See, e.g., EFTA–Indonesia EPA (2018); EFTA–Turkey FTA (2018); Ecuador–EFTA FTA (2018).

[98] See, e.g., Malaysia–Turkey FTA (2014); Australia–Malaysia FTA (2012); Chile–Malaysia FTA (2010).

Australia and New Zealand.[99] IIAs in which States have committed to negotiating ISDS provisions in the future, such as the ASEAN–Hong Kong Investment Agreement (2017),[100] are also captured as not providing for ISDS. These forty-six IIAs are therefore not subject to the analysis in this section.

103. The remaining thirty-four IIAs that are analyzed in this section include both transparency and ISDS provisions. However, only a small portion of these IIAs (five out of thirty-four) do in fact subject transparency commitments to ISDS (**Figure 14**).[101]

Figure 14: Availability of investor-State dispute settlement (ISDS) for transparency commitments (number of IIAs)



Source: Authors' mapping.

[99] See, e.g., Australia–New Zealand Investment Protocol (2011). Australia has a more ambivalent attitude towards ISDS, whereas New Zealand strongly opposes ISDS. As a matter of illustration, New Zealand signed several side instruments to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**") to exclude compulsory ISDS. See, e.g., New Zealand–Australia side letters on ISDS, Trade Remedies and Relationship with Other Agreements (2018).

[100] ASEAN–Hong Kong Investment Agreement (2017), Art. 20.

[101] See also Manjiao Chi, "Regulatory Transparency in International Investment Law" in August Reinisch and Stephan W. Schill (eds.), *Investment Protection Standards and the Rule of Law* (OUP, 2023), 130 (noting that most transparency provisions are "carved out of the scope of [investor-state arbitration]" and thus not subject to ISDS).

104. The exact placement of the transparency commitments in the IIA serves as the main factor indicating whether they are subject to ISDS or not. In this sense, IIAs in the dataset can be divided into two groups:

a. The first group includes nine out of the thirty-four IIAs where transparency commitments are either part of an investment protection agreement or are placed within an investment chapter in an FTA. In five of these nine IIAs, transparency commitments are subject to ISDS. In the remaining four IIAs, transparency commitments are explicitly excluded from the scope of ISDS.

b. The second group consists of twenty-five IIAs, which are structured in a way where transparency provisions and investment protection provisions including ISDS are placed in two distinct chapters. Given that ISDS normally applies only to the substantive provisions of investment chapters,[102] disputes arising out of the transparency chapters included in these IIAs cannot formally be subject to ISDS. Nevertheless, in theory, transparency commitments included in those chapters may be used as context for the interpretation of substantive investment protections.

105. These two groups of IIAs are discussed in more detail below.

(a) Transparency commitments included in investment protection agreements or in investment chapters of FTAs

106. Where transparency commitments are part of investment protection agreements (six IIAs in the dataset),[103] or are placed within the investment chapters of FTAs (three IIAs in the dataset),[104] the analysis of whether these transparency commitments are subject to ISDS is straightforward. Unless there is an explicit exclusion, these transparency commitments are subject to ISDS so that an investor can bring a claim against the host State for the

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[102] See, e.g., Canada–Ukraine Modernized FTA (2023), Art. 17.20(2) ("Under this Section, an investor of a Party may submit a claim that the other Party has breached an obligation under Section B (Investment Protections [...]" [emphasis added]); Pacific Alliance–Singapore FTA (2022), Art. 8.20(a)(i) ("the claimant, on its own behalf, may submit to arbitration under this Section a claim: that the respondent has breached an obligation under Section A; [...]" [emphasis added]; Section A provides only for investment protections).

[103] Australia–Hong Kong Investment Agreement (2019); China–Hong Kong CEPA Investment Agreement (2017); China–Japan–Republic of Korea Trilateral Investment Agreement (2012); ECOWAS Common Investment Code (2019); ASEAN–India Investment Agreement (2014); Chile–China FTA Investment Agreement (2012).

[104] China–Republic of Korea FTA (2015); China–Mauritius FTA (2019); Canada–Panama FTA (2010).

breach of these transparency commitments. This is the case for five of the IIAs under review including one FTA, that is, the China–Republic of Korea FTA (2015).[105]

107. The China–Republic of Korea FTA (2015) is worth highlighting since, apart from one article on transparency in the investment chapter, it also contains a separate chapter on transparency. However, transparency commitments included in this dedicated chapter cannot be subject to ISDS, as was discussed above.[106] Hence, the scope of commitments that can be raised in ISDS is limited only to those commitments that are included in the investment chapter.[107]

China–Republic of Korea FTA (2015)

Chapter 12: Investment

Article 12.8: Transparency

1. Each Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements to which the Party is a party and which pertain to or affect investment activities. The Government of each Party shall make easily available to the public, the names and addresses of the competent authorities responsible for such laws, regulations, administrative procedures and administrative rulings.

[...]

Article 12.12: Settlement of Investment Disputes between a Party and an Investor of the Other Party

1. For the purposes of this Article, an investment dispute is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Party under this Chapter with respect to the investor or its covered investments in the territory of the former Party.

[...]

[emphases added]

[105] ECOWAS Common Investment Code (2019); Australia–Hong Kong Investment Agreement (2019); China–Hong Kong CEPA Investment Agreement (2017); China–Republic of Korea FTA (2015); China–Japan–Republic of Korea Trilateral Investment Agreement (2012).

[106] See para. 104 above.

[107] In contrast to the transparency chapter, the transparency provision in the investment chapter of the China–Republic of Korea FTA (2015) provides for more nuanced publication requirements (e.g., it has a carve-out from publication), contains commitments of engagement requiring the contracting States to identify the competent authorities and respond to specific questions, but does not contain any commitments of good governance.

108. There is at least one instance where an investor has attempted to find a State liable for a breach of a transparency provision included in an investment protection agreement. In the case of *Azurix v. Argentina,* the claimant argued that Argentina breached Art. II(7) of the Argentina–United States BIT (1991), which required each contracting State to publish "all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments", on the ground that the Argentinian authority responsible for water management did not publish its regulations that eventually affected the claimants' investment.[108] Although the tribunal did not elaborate on what exactly can be considered as a breach of this commitment of publication, it set quite a high bar for finding a breach by saying that:

> "There is no doubt that publication of ORAB's regulations would have been a desirable improvement, but the lack of it as argued by the Claimant is <u>not sufficient</u> to conclude that Article II(7) has been breached."[109]

109. On the other hand, if ISDS provisions contain an explicit exclusion of transparency commitments from the scope of possible disputes, such investors' claims would be impossible to make. Transparency commitments are excluded from the scope of ISDS in four IIAs in the dataset including two FTAs, that is, the China–Mauritius FTA (2019) and the Canada–Panama FTA (2010).[110] These FTAs also contain distinct chapters on transparency, which cannot be subject to ISDS.[111]

(b) Transparency commitments included in a chapter separate from an investment chapter

110. Where transparency commitments and investment protections are included in two distinct chapters, the former cannot be subject to ISDS. Nevertheless, investors may try to use State-State transparency commitments included in other chapters of the IIA to interpret

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[108] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ("**Azurix v. Argentina**"), para. 352.

[109] Ibid., para. 378 [emphasis added].

[110] ASEAN–India Investment Agreement (2014), Art. 20(1) (provides a list of articles that are subject to ISDS, and an article on transparency is not included in this list); Chile–China FTA Investment Agreement (2012), Art. 14 (only substantive investment protections included in Section B of the IIA can be subject to ISDS); China–Mauritius FTA (2019), Art. 8.24(1) (provides a list of articles that are subject to ISDS); Canada–Panama FTA (2010), Art. 9.20–9.21 (specifically excludes transparency commitments from ISDS).

[111] China–Mauritius FTA (2019), Ch. 13; Canada–Panama FTA (2010), Ch. 20.

the substantive standards of investment protection, notably the FET standard, or to justify the existence of their legitimate expectations.

111. This happened in the "early and classical case" of *Metalclad v. Mexico* where the tribunal found that a lack of transparency is a violation of the FET standard.[112] In interpreting the FET standard in the NAFTA (1992), the tribunal, *inter alia*, took into account the contracting States' commitment to publish "laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement" which was included in the NAFTA's transparency chapter.[113]

112. This approach was considered as "highly contentious" by commentators.[114] Mexico sought to set aside this award before the Supreme Court of British Columbia, and the court found that the tribunal exceeded its mandate when it held Mexico responsible for the lack of transparency. On the relevance of the transparency chapter included in the NAFTA, the court concluded that the tribunal "misstated the applicable law to include transparency obligations" and further found that transparency "was a matter beyond the scope of the submission to arbitration because there [were] no transparency obligations" in the investment chapter.[115] Nevertheless, the decision in *Metalclad v. Mexico* has greatly influenced "the understanding of the transparency component of FET".[116] Hence, there is the risk that investors or tribunals will use transparency commitments placed outside the investment chapter to interpret the FET standard.[117]

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[112] Manjiao Chi, *supra* n. 101, 131.

[113] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 ("**Metalclad v. Mexico**"), para. 71. This view was later supported by Thomas Wälde in his separate opinion in *Thunderbird v. Mexico*. See *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion, 1 December 2005, paras. 36–37.

[114] Manjiao Chi, *supra* n. 101, 132.

[115] *United Mexican States v. Metalclad Corporation*, Reasons for Judgment of the Honourable Mr. Justice Tysoe, 2 May 2001, paras. 70, 72.

[116] Manjiao Chi, *supra* n. 101, 133.

[117] See, e.g., *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019, paras. 190, 380–381, 404. This case was brought under the Dominican Republic–Central America FTA ("**DR–CAFTA**") (2004), which does not contain any transparency provisions in its investment chapter but rather in a separate chapter with provisions similar to those discussed in this report. The claimants argued that the Dominican Republic had breached the FET provision, "if the Respondent's transparency obligations under DR–CAFTA Chapter 18 [Transparency] are taken into account and used as a guidance". Given that the tribunal declined jurisdiction on grounds that the claimants did not qualify as investors under the DR–CAFTA, there was no opportunity for the tribunal to pronounce on the potential relevance of the transparency chapter to the FET analysis.

113. It is worth noting that there is no doctrinal error in tribunals taking into account transparency commitments that are placed in another chapter of the same IIA. Under the Vienna Convention on Law of Treaties (1969), the terms of the treaty should be interpreted in their context, which comprises the text of the treaty and any agreements or instruments made in the connection with the treaty's conclusion, as well as by taking into account any subsequent agreements or practice of the contracting States regarding the treaty's interpretation and "any relevant rules of international law applicable in the relations between the parties".[118] In fact, in the environmental context, investment tribunals have used relevant chapters on environment included in FTAs, side agreements containing environmental commitments, as well as other international agreements to interpret an IIA's investment commitments.[119]

114. Broad interpretations of the FET standard "have become a source of increasing controversy", especially with respect to transparency commitments.[120] Such interpretations can be "taxing on any State, but especially on developing and least-developed countries".[121] As argued by Sattorova, a developing State's "failure to maintain transparency [...] is often the direct consequence of resource constraints which cannot be alleviated by merely imposing additional (and often considerable) financial liabilities on host states."[122] Given that many investors' claims "put hundreds of millions of dollars in controversy" and "essentially threaten to bankrupt [S]tates following periods of economic

[118] See Vienna Convention on Law of Treaties (1969), Art. 31.

[119] See, e.g., *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, paras. 387–388 (the tribunal took into account Chapter 17 of the United States–Oman FTA (2006) entitled "Environment" as "relevant context in which provisions of Chapter 10 [Investment] must be interpreted"); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, paras. 216–221, 247 (the tribunal interpreted the provisions of the NAFTA (1992) with the reference to a "'side agreement' to the NAFTA on the environment, NAAEC"); *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010, paras. 133–143 (taking into account several international agreements related to the environment). See also Ying Zhu, "Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development" (2018) 58(2) Natural Resources Journal 319, 348, 353.

[120] Matthew C. Porterfield, "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals" (22 March 2013), available at: https://www.iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/. See also Zachary Douglas, "Instead of Principles, Slogans" (2023) 38(1) ICSID Review-Foreign Investment Law Journal 1, 11 (arguing that "the notion of 'transparency' [...] cannot be retained as an element of the FET standard").

[121] UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (New York and Geneva: United Nations, 2012), 139.

[122] Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States* (Oregon: Hart Publishing, 2018), 58–103.

and political turmoil”,[123] States may wish to explicitly limit the scope of the FET standard in their IIAs.

115. One of the options to that end is to qualify or clarify the FET clause (including by way of an indicative or exhaustive list of the obligations falling under FET).[124] Another possible tool to address this concern is to include in the IIAs so-called “firewall provisions,” which “serve to insulate facilitation commitments” from, *inter alia*, dispute settlement mechanisms associated with investment protection.[125] For instance, in the Pacific Alliance–Singapore FTA (2022), the contracting States followed both options in the IIA’s provision on minimum standard of treatment.

> **Pacific Alliance–Singapore FTA (2022)**
>
> **Article 8.7: Minimum Standard of Treatment**
>
> 1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) “fair and equitable treatment” <u>includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, in accordance with the principle of due process embodied in the principal legal systems of the world</u>; and
>
> [...]
>
> 3. <u>A determination that there has been a breach of another provision of this Agreement or another international agreement does not establish that there has been a breach of this Article</u>.
>
> [...]
>
> *[emphases added]*

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[123] Charles H. Brower II, “The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law” (2008) 18 Duke Journal of Comparative and International Law 259, 304–305.

[124] UNCTAD, *supra* n. 121, 139.

[125] UNCTAD, *supra* n. 57, 12.

116. Firewall provisions may be of particular importance when States conclude stand-alone investment facilitation agreements since, as mentioned above, such agreements can be relevant for interpreting the FET standard included in other IIAs of the same States. For example, the Angola–EU SIFA (2023) contains such a firewall provision clarifying that the treaty's investment facilitation provisions do not "create or modify rules on the protection of established investors in the territories of the Parties, or of their investments, or on investor-state dispute settlement".[126] A similar firewall provision is included in the finalized text of the WTO Investment Facilitation for Development Agreement ("**IFDA**").[127] The main reason for its inclusion was exactly to prevent "interpretative overlap between [the IFDA] and IIAs" and "the potential use of the IFDA to justify ISDS claims through the IIA regime".[128]

117. Therefore, if States do not wish for investors to use their trade and investment facilitation commitments, including those on transparency, to support a claim for the breach of the FET standard in ISDS, they should take steps to make this clear in the text of their IIAs. Otherwise, States will risk spending precious resources arguing case after case that transparency commitments included in other chapters within the same IIA, or even in other IIAs, should not be taken into account.

[126] Angola–EU SIFA (2023), Art. 2(3).

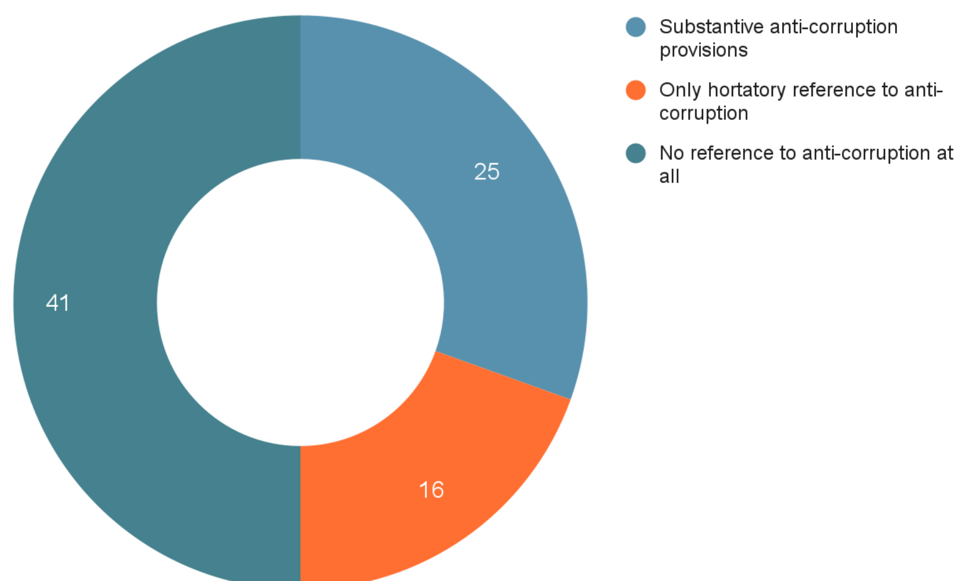
[127] Rashmi Jose, "Reader's Guide: Investment Facilitation for Development Agreement" (IISD, February 2024), 2–3.

[128] Ibid., 3, 33.

2. ANTI-CORRUPTION PROVISIONS

118. This section summarizes the results of the mapping exercise conducted with regard to anti-corruption provisions and comments on the prevalence of specific drafting approaches. As **Figure 15** illustrates, only twenty-five out of the eighty-two IIAs analyzed contain substantive anti-corruption provisions directed at either States or investors. Sixteen other IIAs contain hortatory references in which States affirm or acknowledge the need for anti-corruption. Half of the IIAs mapped do not mention anti-corruption at all.[129]

Figure 15: Anti-corruption provisions in the mapped IIAs (number of IIAs)



Source: Authors' mapping.

119. It should be noted that most of the IIAs which include only hortatory references to anti-corruption do so in the preamble. This includes all twelve of the IIAs concluded by the

[129] Two IIAs under this category do mention anti-corruption, but only in a very specific setting and not as a general commitment or aspiration. Under Art. 24(2)(b) of the Kenya–United Kingdom EPA (2020), Parties agree that their "respective trade and customs legislation and procedures shall be based upon" the need to "protect against fraud and corruption". Under Art. 18 of the New Zealand–Taiwan Province of China Economic Cooperation Agreement ("**ECA**") (2013), Parties commit to penalize corruption occurring in the context of government procurement.

EFTA States that were analyzed in this study.[130] The most common formulation is as follows.

> **EFTA–Georgia FTA (2016)**
>
> **Preamble**
>
> [...]
>
> AFFIRMING their commitment to prevent and combat corruption in international trade and investment and to promote the principles of transparency and good public governance[.]
>
> [...]

120. In other IIAs, similarly hortatory language can be found in the operative treaty provisions. A common formulation is reproduced below.

> **Cambodia–Republic of Korea FTA (2021)**
>
> **Article 7.6: Cooperation on Promoting Increased Transparency and Combating Corruption**
>
> [...]
>
> 2. The Parties affirm their resolve to combat bribery and corruption in international trade and investment in accordance with its applicable laws and regulations.
>
> [...]

121. Substantive anti-corruption provisions, that is, provisions imposing commitments on either States or investors, thus only appear in a minority of the IIAs studied. Geographical and temporal trends can be identified among them. Firstly, considering all 172 treaties with investment provisions signed between 2010 and 2023, the geographical trends are as follows:

    a. Out of seventy-eight IIAs concluded by European countries, sixteen IIAs (21%) have substantive anti-corruption provisions.

    b. Out of forty IIAs concluded by Latin American countries, four IIAs (10%) have substantive anti-corruption provisions.

[130] See, e.g., EFTA–Philippines FTA (2016); Bosnia and Herzegovina–EFTA FTA (2013); EFTA–Costa Rica–Panama FTA (2013); EFTA–Montenegro FTA (2011); EFTA–Hong Kong FTA (2011); Georgia–Hong Kong FTA (2018).

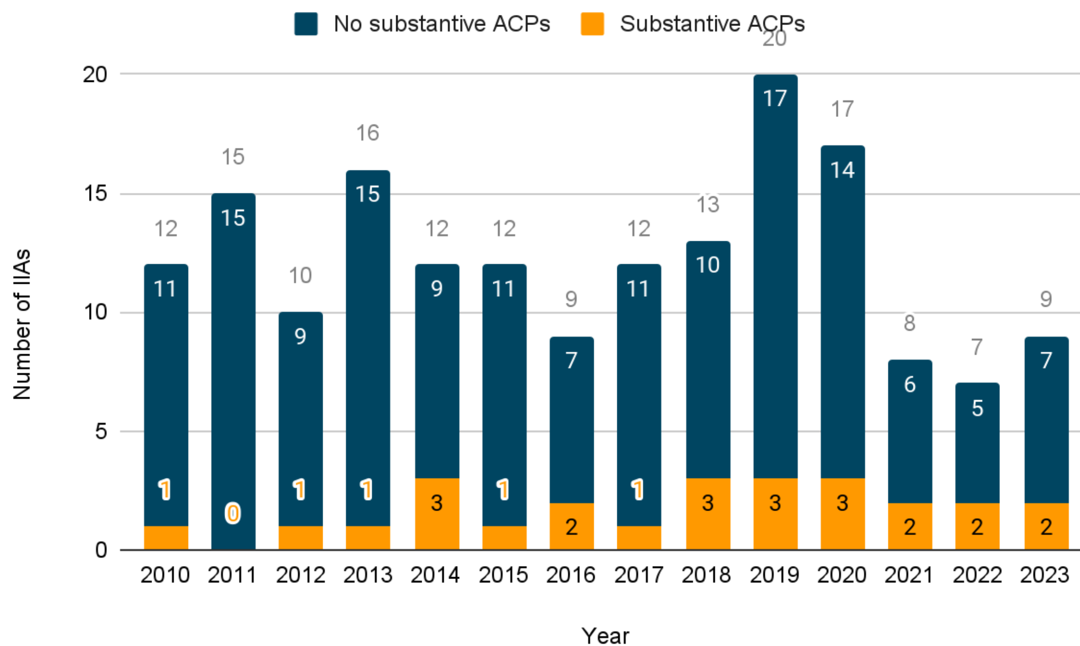
c. Out of forty-one IIAs concluded by North and Central American countries, eight IIAs (20%) have substantive anti-corruption provisions.

d. Out of 102 IIAs concluded by countries in the Asia-Pacific region, twelve IIAs (12%) have substantive anti-corruption provisions.

e. Out of twenty IIAs concluded by African countries, two IIAs (10%) have substantive anti-corruption provisions.

122. The below stacked bar graph shows the prevalence of substantive anti-corruption provisions by year (**Figure 16**). The trend is relatively consistent and the number of new IIAs with such provisions has not increased over time.

Figure 16: A temporal analysis of the prevalence of substantive anti-corruption provisions ("ACPs") in all IIAs signed between 2010 and 2023 (number of IIA)



Source: Authors' mapping and UNCTAD's IIA Navigator.

123. Having drawn some broad generalizations about the appearance of substantive anti-corruption obligations in general, the following subsections will focus on the twenty-five

treaties with substantive anti-corruption provisions among the treaties in the dataset. The study will analyze seven specific types of substantive anti-corruption provisions, which can be divided into two categories: those which impose obligations on States (Section 2.1); and those which impose obligations on private entities or investors as well (Section 2.2). The study avoids going into geographical and temporal trends, due to the low number of IIAs mapped. Lastly, the availability of dispute settlement for anti-corruption provisions is examined (Section 2.3).

2.1. Obligations directed at States

Key takeaways
Among twenty-five IIAs with anti-corruption commitments: ● Eighteen IIAs commit contracting States to adhere to international conventions on anti-corruption. These commitments may have a direct impact on States' international law duties, sometimes by directly leading to ratification of previously signed anti-corruption conventions, and other times via commitments to implement already-ratified conventions. Furthermore, in many IIAs, States promise to adhere to what would otherwise be international soft law instruments. In that regard, State-directed anti-corruption commitments are more than merely hortatory. ● Twenty IIAs include at least a general commitment to regulate against corruption. Such a commitment may be more effective if the term "corruption" is defined in more detail. In addition, eleven of the IIAs analyzed elaborate on the addressees of the anti-corruption measures which States must take (e.g., legal persons). ● Fifteen IIAs also require the effective enforcement of such regulatory measures. Some association agreements ("**AAs**"), concluded by the EU with potential candidates for future EU membership, contain asymmetric enforcement commitments in which only the associated party is bound by this duty. However, other AAs impose enforcement commitments on all contracting States.

- Nineteen IIAs also contain international cooperation provisions. However, these provisions vary in imperativeness. Some merely affirm pre-existing international law duties to cooperate on anti-corruption or to continue working on existing cooperation initiatives. Others detail the type of cooperation that States ought to undertake (e.g., enforcement agency cooperation).

2.1.1. Adherence to international anti-corruption convention(s)

124. Anti-corruption provisions or sections often start with States committing, in a broad sense, to fight corruption before delving into more specific obligations. As **Figure 17** demonstrates, eighteen out of the twenty-five instances of such commitments (72%) refer to the United Nations Convention Against Corruption (2003) ("**UNCAC**"), either exclusively or among other international anti-corruption conventions. The UNCAC is mentioned exclusively in five of these instances, whereas in thirteen instances both the UNCAC and other conventions are mentioned. Among other conventions mentioned, the most common are the OECD Anti-Bribery Convention (1997),[131] and the UN Convention against Transnational Organized Crime (2000) ("**UNTOC**") (and its three Protocols).[132] Still other IIAs have a catch-all clause, stating, for instance, that States are committed to implementing other "relevant Council of Europe instruments",[133] or "other relevant international instruments",[134] on anti-corruption.

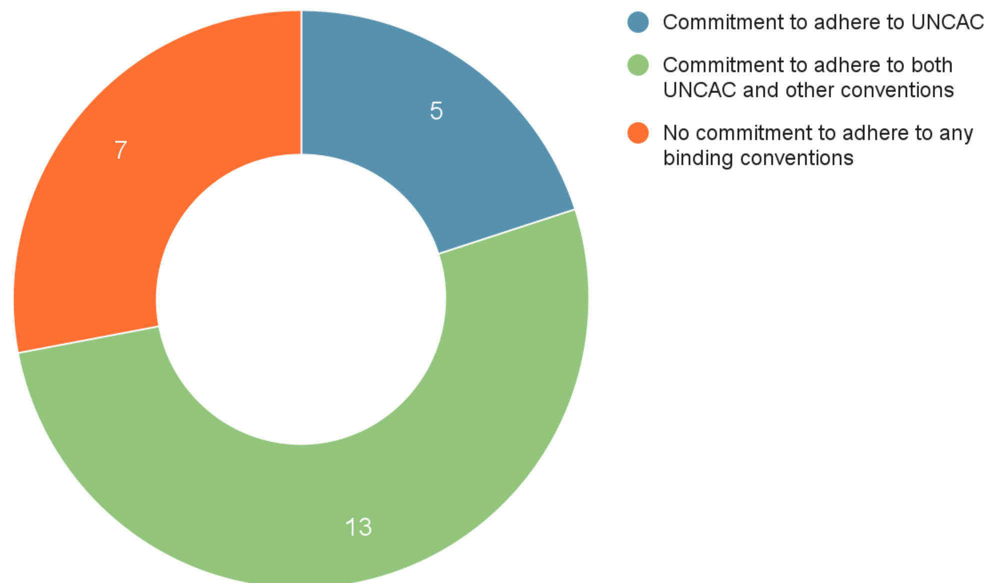
[131] See, e.g., Canada–Ukraine Modernized FTA (2023); Pacific Alliance–Singapore FTA (2022); New Zealand–United Kingdom FTA (2022); Australia–United Kingdom FTA (2021); Japan–United Kingdom CEPA (2020); Iceland–Liechtenstein–Norway–United Kingdom FTA (2021); USMCA (2018).

[132] See, e.g., Moldova–United Kingdom Partnership, Trade and Cooperation Agreement (2020); Armenia–EU CEPA (2017); EU–Kazakhstan EPCA (2015); EU–Georgia Association Agreement (2014); EU–Moldova Association Agreement (2014); EU–Ukraine Association Agreement (2014).

[133] See, e.g., EU–Moldova Association Agreement (2014), Art. 16(2). See also Moldova–United Kingdom Partnership, Trade and Cooperation Agreement (2020).

[134] See EU–Ukraine Association Agreement (2014), Art. 22(4).

Figure 17: Commitment to adhere to international conventions on anti-corruption (number of IIAs)



Source: Authors' mapping.

125. Four principal drafting approaches can be identified in these provisions, which are examined below.

(a) Direct obligation to ratify anti-corruption conventions

126. Three IIAs directly obligate States to accede to anti-corruption conventions to which they are not yet a party. For instance, Art. 17.5(6) of the Canada–Ukraine Modernized FTA (2023) provides that "[a] Party shall accede to the OECD Anti-Bribery Convention, at the earliest opportunity, if it is not a party to the Convention."[135]

127. Such obligations have had a direct impact on signatory States. For instance, although Japan and New Zealand were among the first signatories to the UNCAC, it was only after signing what was then the Trans-Pacific Partnership ("**TPP**") that Japan formally accepted the UNCAC (in July 2017), and it was only after ministerial negotiations had

[135] See also ECOWAS Common Investment Code (2018), Art. 35(4); CPTPP (2018), Art. 26.6(4).

concluded and the then-TPP text drafted,[136] that New Zealand ratified the UNCAC (in December 2015).

(b) Affirmation versus commitment to implement

128. Beyond direct obligations, there are two main ways in which the IIAs studied otherwise refer to the relevant anti-corruption conventions. The first is by providing that each State "affirms their adherence" to the mentioned anti-corruption convention. The second way is by committing States to implementing effectively their obligations under those conventions. On its face, the second drafting approach imposes a more stringent obligation on States.

129. For instance, contrast the following two treaties.

> **Pacific Alliance–Singapore FTA (2022)**
>
> **Article 21.7: Scope**
>
> [...]
>
> 4. Each Party affirms its existing obligations, if applicable and to the extent it is a party under the […] UNCAC, the […] [OECD Anti-Bribery Convention], and the Inter-American Convention Against Corruption, done at Caracas on March 29, 1996 (IACAC).
>
> **Moldova–United Kingdom Partnership, Trade and Cooperation Agreement (2020)**
>
> **Article 18: Preventing and combating organised crime, corruption and other illegal activities**
>
> [...]
>
> 2. […] The Parties are committed to implementing effectively the relevant international standards, and in particular those enshrined in the […] [UNTOC] and its three Protocols, the […] [UNCAC] and relevant Council of Europe instruments on preventing and combating corruption.
>
> *[emphases added]*

130. It is true that, whichever drafting approach is taken, the provision only reinforces international law obligations by which States are already bound. In particular, a good faith interpretation of the phrase "relevant international standards" (referred to in the example

[136] Office of the United States Trade Representative, "Trans-Pacific Partnership Ministers' Statement", available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/trans-pacific-partnership-ministers.

above) would likely refer to standards to which States have already subscribed, since both the United Kingdom and Moldova are signatories to the UNTOC[137] and UNCAC.[138] Other treaties make it more explicit that States merely commit to implement “their respective obligations”.[139]

131. Hence, one might legitimately question whether this type of anti-corruption provision provides any added value at all.[140] In this context, some authors have argued that, whereas international anti-corruption conventions are largely “intended to be enforced through domestic institutions”, references to them in IIAs better allow for international law enforcement.[141] The upshot of this line of argument is that employing the second drafting approach may make a substantive difference. But the extent to which this could be the case may well depend on whether the anti-corruption obligations are subject to SSDS and/or ISDS.

132. From an implementation perspective, however, States’ adherence to anti-corruption commitments under other treaties (e.g., UNCAC) can ease implementation of the specific anti-corruption commitments under IIAs, which we will discuss below. As a matter of illustration, New Zealand in its National Interest Analysis of the New Zealand–United Kingdom FTA (2023) stated that given “the commitments in the Anti-Corruption chapter are consistent with current New Zealand law, policy and practice” as well as “existing international obligations” any additional steps to implement the anti-corruption chapter “are not expected”.[142]

[137] United Nations Treaty Collection, “United Nations Convention against Transnational Organized Crime”, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en.

[138] United Nations, “UNCAC Signature and Ratification Status”, available at: https://www.unodc.org/unodc/en/corruption/ratification-status.html.

[139] See, e.g., Iceland–Liechtenstein–Norway–United Kingdom FTA (2021), Art. 13.12.

[140] Charles N. Brower and Jawad Ahmad, “The State’s Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration” in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP, 2018), 480–481.

[141] Yueming Yan, “The Inclusion of Anti-Corruption Clauses in International Investment Agreements and Its Possible Systemic Implications” (2022) 17(1) Asian Journal of WTO and International Health Law and Policy 141, 147–148.

[142] New Zealand Ministry of Foreign Affairs and Trade, “New Zealand–United Kingdom Free Trade Agreement, National Interest Analysis”, 84.

(c) Reference to soft law instruments

133. Many IIAs also refer to soft law instruments on anti-corruption. For instance, the Australia–Peru FTA (2018) refers to certain soft law instruments, including the APEC Conduct Principles for Public Officials (July 2007) and the APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector (September 2007).[143] In like vein, some IIAs refer to *both* binding and non-binding instruments. For instance, Art. 5(2) of the Angola–EU SIFA (2023) refers to both the UNCAC and the OECD Guidelines for Multinational Enterprises (2011).[144] These references may help give some binding force to what would otherwise be soft law.

(d) Negatively-phrased clauses

134. Finally, some IIAs contain clauses to the effect that "nothing in this Agreement shall affect" States' existing obligations.[145] These are not categorized as commitments to adhere to the relevant convention, as they do not impose any positive obligation on States.

2.1.2. Establishment of a regulatory framework against corruption

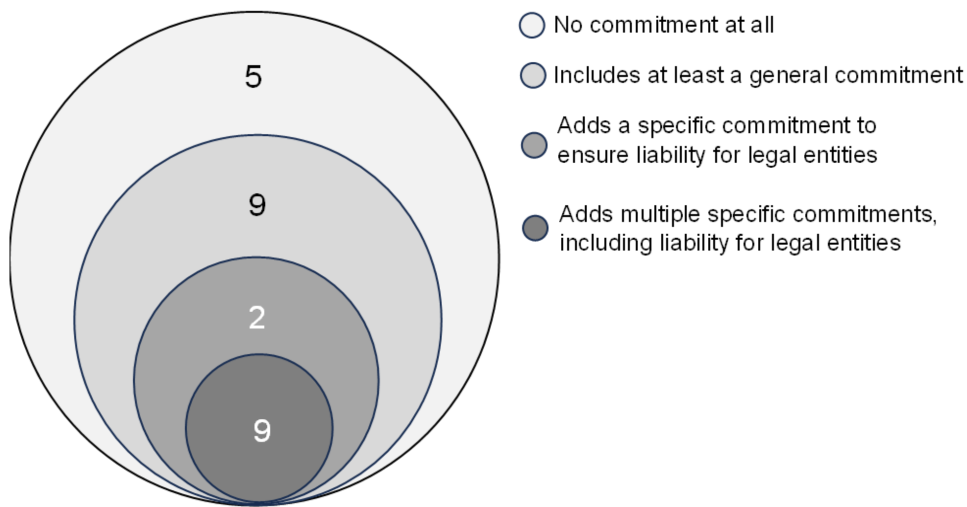
135. A majority of twenty out of the twenty-five IIAs analyzed include at least a general commitment for the contracting States to take regulatory measures against corruption. Of them, nine IIAs (36%) include a general commitment only and eleven IIAs (44%) add a specific commitment to ensure liability for legal entities (**Figure 18**). Nine out of these eleven treaties add further specific commitments, for instance, to promote the integrity of public officials and to promote the participation of the private sector and civil society in anti-corruption efforts.

[143] Australia–Peru FTA (2018), Art. 25.6.

[144] See also USMCA (2018), Art. 27.2(4) (contracting States "reiterate their support for" two APEC instruments and the G20 High Level Principles on Private Sector Transparency and Integrity).

[145] See, e.g., CPTPP (2018), Art. 26.11.

Figure 18: Commitments to regulate against corruption (number of IIAs)



Source: Authors' mapping.

(a) Treaties with no commitments

136. It bears mentioning that only five of the IIAs studied did not include provisions obligating States to regulate against corruption despite containing substantive anti-corruption provisions. Of these five treaties, four simply exclude investors who have engaged in corruption from having access to ISDS.[146] The fifth treaty in this group — the Iceland–Liechtenstein–Norway–United Kingdom FTA (2021) — contains a unique formulation committing the contracting States to implement international conventions (and to cooperate on anti-corruption efforts),[147] but not to individually regulate against corruption.

(b) Drafting variations for general commitments

137. A general commitment to regulate against corruption can take many forms. Some IIAs mandate *criminalization* and contain very detailed definitions leaving little doubt as to

[146] In particular, the Indonesia–Republic of Korea CEPA (2020), the EU–Viet Nam Investment Protection Agreement (2019), the Australia–Indonesia CEPA (2019), and the Canada–EU CETA (2016).

[147] See Subsection 2.1.4 below.

the acts of corruption which the contracting Parties must criminalize. A good example of this approach comes from Art. 21.8 of the Pacific Alliance–Singapore FTA (2022).[148]

> **Pacific Alliance–Singapore FTA (2022)**
>
> **Article 21.8: Measures to Combat Corruption**
>
> 1. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as criminal offences under its law, in matters that affect international trade or investment, when committed intentionally, by any person subject to its jurisdiction:
>
> (a) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of his or her official duties;
>
> (b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of his or her official duties;
>
> (c) the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; and
>
> (d) the aiding or abetting, or conspiracy in the commission of any of the offences described in subparagraphs (a) through (c).
>
> [...]
>
> *[emphases added]*

138. Such a provision addresses both the demand and supply side of bribery. Encouragingly, clause (c) would appear to impose obligations on the contracting States also when acting as *home* States too. To that extent, it goes even further than the recently finalized IFDA (2023).[149] During the IFDA negotiations, there was a proposal to require home State measures relating to sustainable investment, but this was rejected, with some WTO

[148] See also Australia–Peru FTA (2018), Art. 25.7; CPTPP (2018), Art. 26.7.

[149] Specifically, see IFDA (2023), Art. 38. See also Rashmi Jose, *supra* n. 127, 25–26.

members arguing that the home State's role should be one of investment promotion only, not facilitation.[150]

139. At the other end of the spectrum, some IIAs (1) do not obligate contracting Parties to criminalize corruption or even enact or maintain anti-corruption legislation; and (2) are less specific as to the definition of corruption, instead, referring to "active or passive" practices or relying on the definitions found in international anti-corruption conventions.[151] This is illustrated by the below examples.

> **EU–Georgia Association Agreement (2014)**
>
> **Article 394: Prevention of Fraud, Corruption and Irregularities**
>
> [...]
>
> 2. The EU and Georgian authorities shall <u>take any appropriate measures</u> to prevent and remedy any <u>active or passive corruption practices</u> and exclude conflict of interest at any stage of the procedures related to the implementation of EU funds.
>
> **Angola–EU SIFA (2023)**
>
> **Article 5: Measures against corruption and other illegal activities**
>
> [...]
>
> 2. Each Party confirms its commitment to <u>take adequate measures</u> to prevent and fight corruption, money laundering, terrorism financing, tax fraud and tax evasion, with regard to matters covered by this Agreement, <u>in accordance with internationally agreed standards</u> […]
>
> *[emphases added]*

140. Nevertheless, all such provisions are here categorized as including "general" rather than specific commitments because, although the detailed provisions are explicit as to criminalization and the definition of corruption, they do not go into detail on the addressees of the measures which States must undertake (e.g. legal entities, public officials, or civil society).

[150] Rashmi Jose and Andreas Oeschger, "The State of Play for Sustainable Development in the Joint Statement Initiative on Investment Facilitation for Development" (IISD, April 2022), 14–15.

[151] Although, it bears noting that Arts. 15–16 of the UNCAC are already relatively specific on the definition of corruption. See Yueming Yan, *supra* n. 141, 147.

(c) Specific commitment to ensure liability for legal entities

141. The most common specific commitment is to ensure that legal entities can be held criminally liable for corruption. Some IIAs consider the possibility that criminal liability for non-natural persons may not be possible under domestic law and thus require civil liability in the alternative.

> **Canada–Honduras FTA (2013)**
>
> **Article 20.9: Anti-Corruption Measures**
>
> [...]
>
> 4. […] If, under the legal system of a Party, enterprises cannot be held criminally liable, the Party shall ensure that enterprises are subject to effective, proportionate, and dissuasive non-criminal sanctions for the offenses described…

142. One notes that an obligation to ensure dissuasive sanctions, criminal or otherwise, on corrupt legal entities is in line with best practices with regard to anti-corruption provisions in FTAs.[152] It is also consistent with international standards.[153]

(d) Other specific commitments

143. Besides liability for legal entities, other specific commitments include, as mentioned earlier, obligations to promote the integrity of public officials and obligations to promote public participation in anti-corruption efforts.[154]

144. Some IIAs go beyond these commitments. For instance, Art. 28.4 of the New Zealand–United Kingdom FTA (2022) obliges States to have "publicly available procedures" for whistleblowing and to enact measures providing for a remedy when whistleblowers are subject to "discriminatory or disciplinary treatment".

---

[152] See, e.g., Matthew Jenkins, *supra* n. 7, 7.

[153] See OECD Anti-Bribery Convention (1997), Art. 3(2). See also Julien Chaisse, "Tackling Corruption in Foreign Investment: Insights from Investment Arbitration Cases" (2023) 16(2) Law and Development Review 253, 262.

[154] See, e.g., Canada–Ukraine Modernized FTA (2023), Arts. 15.10–15.11.

2.1.3. Effective enforcement of anti-corruption measures

145. A small majority (fifteen out of twenty-five) of the IIAs analyzed commit States to effectively enforce the anti-corruption measures mentioned in Subsection 2.1.2 above. The most common formulation of this commitment is present, for example, in the Pacific Alliance–Singapore FTA (2022).

> **Pacific Alliance–Singapore FTA (2022)**
>
> **Article 21.12: Application and Enforcement of Anti-Corruption Laws**
>
> 1. In accordance with the fundamental principles of its legal system, no Party shall fail to effectively enforce its laws or other measures adopted or maintained to comply with Article 21.8.1 [Measures to Combat Corruption] through a sustained or recurring course of action or inaction, after the date of entry into force of this Agreement for that Party, as an encouragement for trade and investment.
>
> [...]
>
> *[emphases added]*

146. Three of the five association agreements entered into by the EU and analyzed in this study contain asymmetric enforcement commitments, binding only the associated party and not the EU.[155]

> **EU–Moldova Association Agreement (2014)**
>
> **Article 425: Investigation and Prosecution**
>
> The authorities of the Republic of Moldova shall ensure investigation and prosecution of suspected and actual cases of fraud, corruption or any other irregularity, including conflict of interest, following national or EU controls. Where appropriate, OLAF may assist the competent authorities of the Republic of Moldova in that task.
>
> *[emphases added]*

147. The associated party is often the recipient of EU funding as well as enforcement assistance, but in turn faces additional obligations to take appropriate measures to safeguard EU funds from fraud and/or corruption.[156]

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[155] Similar language is contained in the Armenia–EU CEPA (2017), Art. 354, and the EU–Georgia Association Agreement (2014), Art. 395.

[156] See also EU–Georgia Association Agreement (2014), Art. 394(1).

148. However, another drafting approach is to provide for assistance while obligating all contracting Parties to investigate and prosecute corruption as seen in the example below.

> **EU–Ukraine Association Agreement (2014)**
>
> **Annex XLIII[157] to Title VI**
>
> **Article 3: Investigation and Prosecution**
>
> The Parties shall ensure investigation and prosecution of suspected and actual cases of fraud, corruption or any other irregularity including conflict of interest, following national or EU controls. Where appropriate the European Anti-Fraud Office may assist the competent Ukrainian authorities in this task.
>
> *[emphases added]*

2.1.4. Cooperation on anti-corruption efforts

149. Most IIAs analyzed (nineteen out of twenty-five) contain commitments to cooperate on anti-corruption efforts. Broadly speaking, the study has identified three such types of international cooperation provisions, which are presented below in increasing order of imperativeness. However, it should be noted that these types are not mutually exclusive, as some IIAs contain multiple cooperation provisions.

150. The first type of international cooperation provisions does no more than affirm the contracting States' pre-existing obligations to cooperate under other treaties.

> **Australia–United Kingdom FTA (2021)**
>
> **Article 28.13: Application and Enforcement of Measures to Prevent and Combat Bribery and Corruption**
>
> [...]
>
> 3. The Parties affirm their commitments under applicable international agreements or arrangements to cooperate with each other, consistent with their respective legal and administrative systems, to enhance the effectiveness of law enforcement actions to combat the [corruption] offences described […].
>
> *[emphases added]*

[157] Art. 459(1) of the EU–Ukraine Association Agreement (2014) obliges Parties to "implement assistance" and "cooperate" in accordance with Annex XLIII.

151. The second type includes provisions obligating contracting States to endeavor to cooperate in advancing existing international anti-corruption initiatives.[158]

> **Pacific Alliance–Singapore FTA (2022)**
>
> **Article 21.9: Cooperation**
>
> 1. The Parties acknowledge the importance of cooperation to prevent and combat bribery and corruption in international trade and investment, including through regional and multilateral initiatives and shall endeavour to work together to advance these efforts, on a mutually agreed basis.
>
> [...]
>
> *[emphases added]*

152. The third type of international cooperation provisions includes more detail by identifying the *type* of cooperation contracting States ought to undertake including, but not limited to (1) technical cooperation activities, such as training programs;[159] (2) general enforcement agency cooperation;[160] and (3) specific enforcement cooperation, such as notifications of detected corruption, prosecution, and asset recovery.[161]

153. An example of a clause which neatly combines the first and third type of cooperation provision can be found in Art. 16 of the Armenia–EU CEPA (2017).

> **Armenia–EU CEPA (2017)**
>
> **Article 16: Fight against organised crime and corruption**
>
> [...]
>
> 2. The Parties shall enhance bilateral, regional and international cooperation among law-enforcement bodies, including the possible development of cooperation between European Union Agency for Law Enforcement Cooperation (Europol) and the relevant authorities of the Republic of Armenia. The Parties are committed to implementing effectively the relevant international standards, in particular those enshrined in the UN Convention against Transnational Organised Crime of 2000 and the three Protocols

[158] See also the similar language in Art. 15.9 of the Canada–Ukraine Modernized FTA (2023) and Art. 20.10 of the Canada–Panama FTA (2010).

[159] See, e.g., USMCA (2018), Art. 27.9(3); Pacific Alliance–Singapore FTA (2022), Art. 21.9(2).

[160] See USMCA (2018), Art. 27.9(2) ("[t]he Parties shall endeavor to strengthen cooperation and coordination among their respective anti-corruption law enforcement agencies").

[161] See EU–Kazakhstan EPCA (2015), Art. 265 (obligation to inform the European Anti-Fraud Office and/or the Kazakh authorities); Australia–United Kingdom FTA (2021), Art. 28.13(4) (cooperation in investigation, prosecution, and freezing and confiscation of proceeds of corruption).

thereto. The Parties shall cooperate in preventing and fighting corruption in line with the UN Convention Against Corruption of 2003, the recommendations of the Group of States against corruption (GRECO) and the OECD, transparency with regard to asset declaration, the protection of whistle-blowers, and the disclosure of information on final beneficiaries of legal entities.

[emphases added]

2.2. Obligations directed at investors

Key takeaways

Among twenty-five IIAs with anti-corruption commitments:

- Only one, the ECOWAS Common Investment Code (2019), imposes affirmative obligations on investors to refrain from corruption and to adhere to good accounting and corporate governance standards. This is in line with the general reluctance to impose direct international law obligations on investors.
- However, eight IIAs provide that corruption at the establishment stage of an investment affects the protection that investors would otherwise be afforded. The Canada–Honduras FTA (2013) clearly has a jurisdictional effect, as it excludes corruptly made investments from the definition of "investment". Whether the provisions in the other seven IIAs go towards jurisdiction or admissibility is less clear.

2.2.1. "Affirmative" obligations[162]

154. Of the IIAs studied, only the ECOWAS Common Investment Code (2019) contains affirmative anti-corruption obligations directed at investors. Two types of this kind of obligations can be identified. First, Arts. 38(1)–(2) of the Code impose an obligation on investors to refrain from acts of corruption (towards host State public officials) and to cooperate with the contracting States in anti-corruption efforts.

[162] The distinction between "affirmative" and "punitive" anti-corruption provisions on investors was made by UNESCAP. See UNESCAP, *supra* n. 2, 43–44.

> **ECOWAS Common Investment Code (2019)**
>
> **Article 38: Obligations of Investors**
>
> 1. Investors doing business in ECOWAS territory shall not, prior to the establishment of an investment or there after offer, promise or give any undue pecuniary or any undue advantage to a public official of a Member State or to a member of an official's family, business associate or other person in close proximity to an official or another person or any entity in order that the official acts or refrains from acting in relation to the performance of, or the exercise of, his or her official duties in order to achieve any favour or compromise in relation to the proposed investment.
>
> 2. The investors shall cooperate with Member States in eliminating corruption in public governance and shall accordingly, not encourage, incite, aid, abet or conspire with any official or another person or any entity to commit or authorise the commission of acts described in Article 37 above.
>
> *[emphases added]*

155. Second, Art. 34 of the Code obliges investors to adhere to good accounting and corporate governance standards.

> **Article 34: Corporate Governance and Responsible Business Conduct**
>
> 1. Investors shall comply with all international best practices, regional, and national laws and regulations applicable to corporate governance in the ECOWAS territory in order to promote improved corporate accountability and transparency in the region.
>
> […]
>
> 4. In this regard, investors are required to […] (f) adhere to the financial reporting, disclosure, accounting, and audit practices satisfying the requirements of the International Financial Reporting Standards (IFRS) […].
>
> *[emphases added]*

156. Among the twenty-five IIAs studied, at least twelve IIAs address issues of corporate social responsibility ("**CSR**"), including anti-corruption, often in the investment chapter.[163] However, in so doing, they only oblige (host) States to "encourage" investors to incorporate such CSR standards and thus do not place investors under an international

[163] Canada–Panama FTA (2010), Art. 9.17; Canada–Honduras FTA (2013), Art. 10.16; Canada–Ukraine Modernized FTA (2023), Art. 17.15; Pacific Alliance–Singapore FTA (2022), Art. 8.17; Australia–Peru FTA (2018), Art. 8.17; Indonesia–Republic of Korea CEPA (2020), Art. 7.18; Australia–Indonesia CEPA (2019), Art. 14.17; New Zealand–United Kingdom FTA (2022), Art. 14.19; Australia–United Kingdom FTA (2021), Art. 13.19; USMCA (2018), Art. 14.17; CPTPP (2018), Art. 9.17; Angola–EU SIFA (2023), Art. 34.

law obligation. A typical example of this kind of provision can be seen in Art. 9.17 of the Canada–Panama FTA (2010).

> **Canada–Panama FTA (2010)**
>
> **Article 9.17: Corporate Social Responsibility**
>
> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies [...] These principles address issues such as […] anti-corruption.
>
> *[emphases added]*

157. The paucity of anti-corruption obligations addressed at investors in the IIAs studied is consistent with UNCTAD's most recent finding that, even amongst IIAs signed since 2020, only 13% include any form of investor obligations.[164] Moreover, although UNCTAD had previously suggested investor obligations as a policy option oriented towards sustainable development, the actual recommended options "[stop] short of […] outright obligations on investors", and instead (1) require investors to comply with host State laws and/or (2) *encourage* them to observe CSR.[165] These policy options correspond roughly to the punitive provisions discussed in Subsection 2.2.2 below, and the type of CSR clause seen above, respectively.

158. Indeed, outright international law obligations on investors would be difficult to enforce as it would "require a significant reimagining of the current ISDS legal infrastructure" to directly initiate an arbitral proceeding against an investor.[166] This is so, despite arguments expressed in literature that ISDS tribunals have begun to recognize international law obligations on investors.[167]

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[164] UNCTAD, *World Investment Report 2023: Investing in Sustainable Energy for All* (New York: United Nations, 2023), 73.

[165] UNCTAD, "Investment Policy Framework for Sustainable Development" (2015), 77–78, 85.

[166] See Kraijakr Thiratayakinant, "Investors' Obligations Under IIAs: Toward a Practical Solution" (2024) Columbia FDI Perspectives No. 376.

[167] See, e.g., Susan Karamanian, "International Investment Agreements, Investor Obligations, and the Rule of Law" in August Reinisch and Stephan W. Schill (eds.), *Investment Protection Standards and the Rule of Law* (OUP, 2023).

2.2.2. "Punitive" provisions

159. What we call "punitive" provisions are provisions explicitly denying IIA protection and/or access to dispute settlement to investors who have engaged in corruption. We note that many IIAs already contain what is known as a legality requirement, that is, they define "covered investment" as an investment "made in accordance with the applicable law at the time the investment is made" which typically covers instances of corruption.[168] Even though the practical effect of a legality requirement is similar to a provision containing an outright and explicit denial, we do not categorize legality requirements among the punitive provisions examined here because of their lack of explicitness vis-à-vis mentioning (anti-)corruption.

160. Given this definition, most of the IIAs studied (approximately 68%) do not contain punitive provisions, that is, they do not explicitly deny coverage or protection to investors who have engaged in corruption (**Figure 19**). Of the eight IIAs that do deny such protection, three types of punitive provisions can be identified. A common feature of all three types is that they refer to corruption at the establishment stage of an investment. Therefore, in the context of an ISDS dispute, punitive provisions will likely be relevant at the jurisdiction or admissibility stage of a case, rather than the merits.[169] To set the context:

    a. Illegalities that, under the law of the host State, affect the legal acquisition of the assets forming the investment will bar jurisdiction, since in ISDS the acquisition of an investment is a "condition precedent for the investment treaty's conferral of adjudicative power upon the tribunal."[170]

    b. Illegalities violating international public policy in the underlying transaction that resulted in the acquisition of the assets forming the investment will affect the

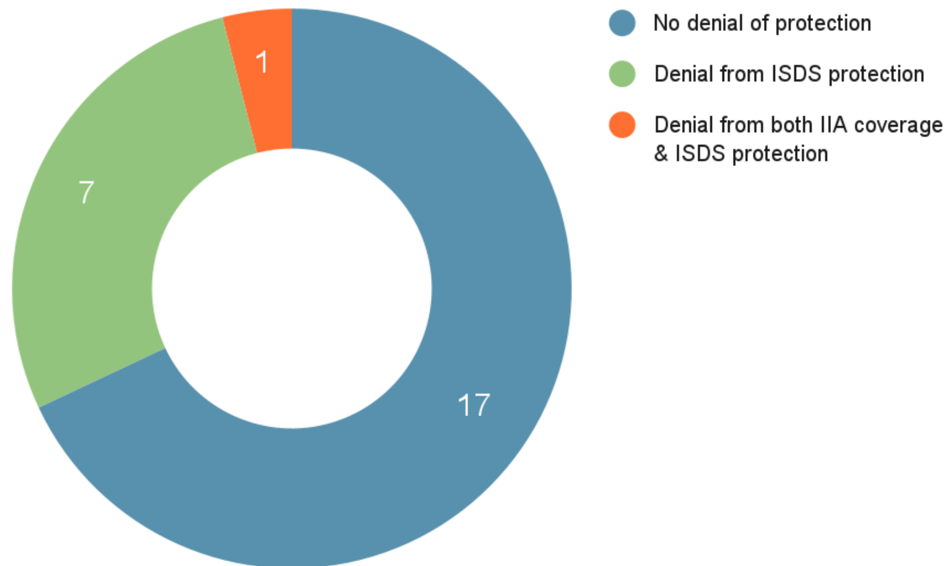
[168] See Yueming Yan, "Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance" (2020) 23(4) Journal of International Economic Law 989, 998. For examples among the IIAs in this study's dataset, see Canada–Ukraine FTA (2023), Art. 17.1; New Zealand–United Kingdom FTA (2022), Art. 1.3.

[169] See, by analogy, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ("**Fraport v. Philippines**"), para. 345. This case examined a legality requirement, but the principles expressed therein are transposable to the punitive provisions analyzed here.

[170] Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration" (2014) 29(1) ICSID Review 155, 156.

admissibility of the investor's claim. Since corruption of public officials violates international public policy, international investment law ought not to come to the assistance of a corrupt investor.[171]

Figure 19: Exclusion of IIA/ISDS protection for investments made through corruption (number of IIAs)



Source: Authors' mapping.

161. With this background context in mind, the first type of punitive provision excludes investments "allowed or made pursuant to fraudulent misrepresentation, bribery, or corruption" from the definition of "investment" altogether. This is only seen in the Canada–Honduras FTA (2013) through the combined reading of Arts. 10.1(k)(iv) and 10.2(1)(b). The effect of this type is clearly jurisdictional. Both IIA coverage and ISDS protection are denied to corrupt investors, since the investment chapter only applies to host State measures relating to an "investment".

[171] *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No ARB/00/7, Award, 4 October 2006; *Littop Enterprises Ltd and others v. Ukraine*, SCC Case No. V 2015/092, Final Award, 4 February 2021 ("**Littop v. Ukraine**"), paras. 536–537; *BSG Resources Ltd and others v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022, paras. 485–486, 1085.

162. The second type of punitive provision explicitly prevents investors who have engaged in corruption from submitting ISDS claims. Six IIAs adopt this approach, as seen in the example of Art. 17.20 of the Canada–Ukraine Modernized FTA (2023) below.[172] It is not clear whether, under this approach, corruption would affect jurisdiction or admissibility.[173] If corruption only affects the status of the investor's claim but not the legal acquisition of the investment assets in question, one might argue that the consent of the contracting States to arbitration is not affected, rendering corruption an issue of admissibility in this instance.

> **Canada–Ukraine Modernized FTA (2023)**
>
> **Article 17.20: Scope and Purpose [of ISDS]**
>
> [...]
>
> 3. For greater certainty, an investor <u>may not submit a claim</u> under this Section if the investment has been made through fraudulent misrepresentation, concealment, <u>corruption</u>, or conduct amounting to an abuse of process.
>
> *[emphases added]*

163. Finally, the third type of punitive provision, seen only in Art. 8.20 of the Pacific Alliance–Singapore FTA (2022), does not bar claims *per se* but allows respondent States to object on grounds that the investment has been made through corruption. As compared to the second type of provision, this appears less likely to render corruption an issue of jurisdiction, since the clause itself states neither that corruptly acquired assets are not investments, nor that the claimant may not initiate arbitral proceedings.

> **Pacific Alliance–Singapore FTA (2022)**
>
> **Article 8.20: Submission of a Claim to Arbitration**
>
> [...]
>
> 2. For greater certainty, objections that a respondent may raise in any proceedings under this Section, would include, but not be limited to, <u>objections on the ground that an investment has been made,</u>

[172] See also Indonesia–Republic of Korea CEPA (2020), Art. 7.19(3)(c); Australia–Peru FTA (2018), Art. 8.20(2); EU–Viet Nam IPA (2019), Art. 3.27(2); Australia–Indonesia CEPA (2019), Art. 14.21(1)(c); Canada–EU CETA (2016), Art. 8.18(3).

[173] Cf. Yueming Yan, *supra* n. 168, 1001–1002 (arguing that it would affect jurisdiction).

established, acquired or admitted through fraud or misrepresentation, concealment, corruption or conduct amounting to an abuse of process.

[...]

[emphases added]

164. On its face, a drafting approach with an effect that goes to admissibility is the more flexible one. The host State can object on grounds of corruption, but the tribunal remains entitled to exercise jurisdiction. Such an approach is consistent with the view that corruption ought not to automatically defeat an investment treaty claim, when the host State may have been lackadaisical or even complicit.[174]

165. At the same time, however, it can also be questioned whether a provision like the first type, with clearly jurisdictional effect, actually places tribunals under an inflexible obligation to decline jurisdiction. First, some authors have argued that equitable estoppel can bar States' objections in general,[175] including jurisdictional objections, provided that the State knew about the corruption and the investor can demonstrate detrimental reliance.[176] Second, a proportionality test for when jurisdiction can be declined has been proposed,[177] although the status of the test in arbitral practice is unclear.[178] Under such a test, jurisdiction would not automatically be declined, and the tribunal might ask whether the investor's misconduct has compromised "a significant interest of the Host State", such that denial of IIA protection is "a proportionate consequence".[179]

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[174] Romesh Weeramantry and Clementine Packer, "Chapter 16: Corruption and Fraud in Investor-State Arbitration: Central Asian Experience" in Kiran N. Gore et al. (eds.), *International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues* (Alphen aan den Rijn: Kluwer Law International, 2022), 442–443.

[175] Andrew T. Bulovsky, "Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development" (2019) 118(1) Michigan Law Review 117, 137–138. See generally Andrew T. Bulovsky, "The Over- and Under-Enforcement of Anti-Corruption Law in Investment Disputes and International Development" (2020) 9 Cambridge International Law Journal 264.

[176] *Fraport v. Philippines*, paras. 346–347; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras. 182, 248. See also *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 ("**Kim v. Uzbekistan**"), paras. 539–540.

[177] See, by analogy, *Kim v. Uzbekistan*, para. 408. See Weeramantry and Packer, *supra* n. 174, 442.

[178] See *Littop v. Ukraine*, para. 457 (although the reasoning of the tribunal has been redacted); Yueming Yan, *supra* n. 168, 1006.

[179] The test was formulated in the *Kim v. Uzbekistan* case in relation to the legality requirement in Art. 12 of the Uzbekistan–Kazakhstan BIT (1997), but the principles expressed therein could be transposable to the punitive provisions analyzed here. In particular, the text of Art. 12 did not require a proportionality test, but the tribunal

2.3. Dispute settlement for anti-corruption commitments

166. As mentioned above, four out of the twenty-five IIAs under review contain only punitive provisions denying access to ISDS to investors who have engaged in corruption.[180] Given that such punitive provisions cannot be the subject of a dispute, these four IIAs are not analyzed in this section which addresses whether substantive anti-corruption commitments included in the remaining twenty-one IIAs are subject to SSDS and ISDS.

2.3.1. State-State dispute settlement

Key takeaways
Among twenty-one IIAs with substantive anti-corruption commitments and binding SSDS: ● Only in eleven IIAs are anti-corruption commitments subject to SSDS without any modifications. ● In the remaining ten IIAs, anti-corruption commitments are either fully or partially excluded from SSDS. Most often excluded are commitments to cooperate and to enforce anti-corruption measures. This approach can be generally explained by States' reluctance to admit corruption, which may undermine their legitimacy and credibility. ● Seven of the twenty-one IIAs (a greater number compared to what the case is with respect to transparency commitments) establish specific procedures for the resolution of disputes arising out of anti-corruption commitments. Normally, these procedures require: (1) the participation of domestic anti-corruption authorities in any non-binding dispute settlement mechanisms between contracting States; and (2) choosing arbitrators on the basis of their expertise in issues of corruption. Four out of these seven IIAs were concluded by Canada, which is in line with Canada's growing attention toward issues of corruption.

undertook a good faith interpretation and concluded that the "significance of the violation", bearing in mind the host State's general attitude towards similar violations, was a relevant factor. See *Kim v. Uzbekistan*, paras. 412–413, 365–366, 398, 406.

[180] These are the Indonesia–Republic of Korea CEPA (2020), the EU–Viet Nam Investment Protection Agreement (2019), the Australia–Indonesia CEPA (2019), and the Canada–EU CETA (2016).

167. In mapping IIAs under this heading the same methodology was applied as with respect to transparency provisions.[181] Hence, the subsections below will first address the contracting States' consent to resolve disputes arising out of anti-corruption commitments through binding SSDS and then turn to the procedures applicable to such disputes.

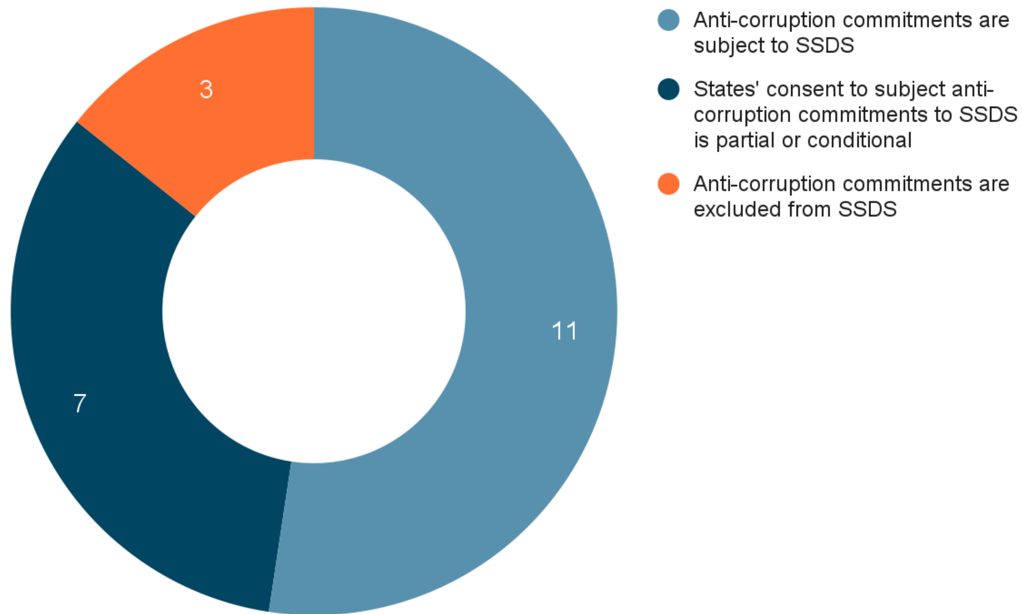
168. Given that the WTO Agreement does not impose any anti-corruption obligations upon WTO members, a conflict of jurisdiction over anti-corruption commitments does not arise. Hence, this issue is not analyzed here.

(a) States' consent to resolve disputes arising out of anti-corruption commitments through binding SSDS

169. Our analysis revealed that, in contrast to what the case is for transparency provisions, in only eleven out of the twenty-one IIAs are anti-corruption commitments subject to binding SSDS without any substantive restrictions. In the remaining ten IIAs anti-corruption commitments are either fully or partially excluded from SSDS (**Figure 20**).

[181] See Subsection 1.4.1 above.

Figure 20: Availability of State-State dispute settlement (SSDS) for anti-corruption commitments (number of IIAs)



Source: Authors' mapping.

170. As follows from **Figure 20**, in seven out of twenty-one IIAs under review the contracting States' consent to resolve disputes arising out of anti-corruption commitments is either partial or conditional.[182] In one IIA discussed above[183] — the Angola–EU SIFA (2023) — the disputing States' consent to State-State arbitration, including with respect to a dispute arising out of that treaty's anti-corruption commitments, must be given on a case-by-case basis. Six of the IIAs under review exclude anti-corruption commitments relating to the "application and enforcement of measures to prevent and combat bribery and corruption" from the scope of SSDS.[184] Two out of these IIAs additionally exclude States'

[182] See, e.g., Moldova–United Kingdom Partnership, Trade and Cooperation Agreement (2020), Art. 347; Central America–EU Association Agreement (2012), Art. 308; Canada–Honduras FTA (2013), Art. 21.6(2).

[183] See paras. 79–80 above.

[184] See, e.g., New Zealand–United Kingdom FTA (2022), Art. 28.9(4).

cooperation commitments with respect to anti-corruption.[185] This is clearly the recent trend as all seven IIAs were concluded after 2016 with more than half of them concluded between 2021 and 2023.

171. Furthermore, in three out of twenty-one IIAs anti-corruption commitments are excluded from SSDS altogether.[186]

172. These modifications of States' consent to SSDS seem to be in line with the emerging trend to exclude investment facilitation features from formal dispute settlement.[187] The exclusion of anti-corruption commitments from the scope of SSDS could be further explained by the following considerations:

a. Corruption remains a major global challenge. According to Transparency International, there are no absolutely clean countries in terms of corruption, whereas over two-thirds of countries "have serious corruption problems".[188] At the same time, it can be relatively easy to find States liable for corruption as the conduct of a State's official that "accepted a bribe to exercise […] public duties in a certain manner" is attributable to that State.[189] In light of this, the exclusion may be an attempt by States to not turn the alleged violation of anti-corruption commitments into an effective tool for them to exert pressure on each other.

b. Corruption "undermines the legitimacy of governments" and the credibility of the State, and "damages people's trust in State institutions".[190] For this reason, States can be generally reluctant to admit their breach of anti-corruption commitments and to have international tribunals pronounce on that. In this context, it is worth noting

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[185] See Pacific Alliance–Singapore FTA (2022), Art. 19.14; USMCA (2018), Art. 27.8(3) ("No Party shall have recourse to dispute settlement under this Article or Chapter 31 (Dispute Settlement) for a matter arising under Article 27.6 (Application and Enforcement of Anticorruption Laws) or Article 27.9 (Cooperation).").

[186] See Moldova–United Kingdom Partnership, Trade and Cooperation Agreement (2020), Art. 347; Canada–Honduras FTA (2013), Art. 21.6(2); Central America–EU Association Agreement (2012), Art. 308.

[187] See para. 79 above.

[188] Transparency International, "Corruption Perceptions Index" (2023), available at: https://www.transparency.org/en/cpi/2023/.

[189] Generally, see Ayodeji Akindeire, "Corruption in Investor-State Arbitration: Balancing the Scale of Culpability" in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (Singapore: Springer, 2021), 865–879.

[190] See Martin Sajdik, "Delivering Justice on the Ground: The Challenges of Fighting Corruption at the National and International Levels" (2012) XLIX(4) Delivering Justice 19.

that, as of 2021, there were no reported ISDS cases "where a State took any step to investigate and/or prosecute any of its officials for alleged act of corruption in respect of foreign investment in its territory".[191]

c. Finally, there is a general discussion on whether arbitral tribunals are well placed to investigate corruption allegations given their limited procedural powers. In the ISDS context, for example, it has been argued that some tribunals "have simply avoided the difficult task of ruling on corruption allegations".[192]

(b) Procedures applicable to disputes arising out of anti-corruption commitments

173. All twenty-one of the IIAs that have anti-corruption commitments provide for international arbitration as a forum for the resolution of disputes between the contracting States. Given that all these IIAs also contain transparency commitments, which are subject to SSDS, the description of the general SSDS procedure provided in Subsection 1.4.1 above applies equally here.

174. However, what requires emphasis in this context is that one third of the IIAs under review (seven out of twenty-one) provide for specific procedures or other procedural deviations applicable to the disputes arising out of anti-corruption commitments (**Figure 21**). This stands in stark contrast to transparency commitments, which are subject to specific SSDS procedures in only one IIA out of eighty.

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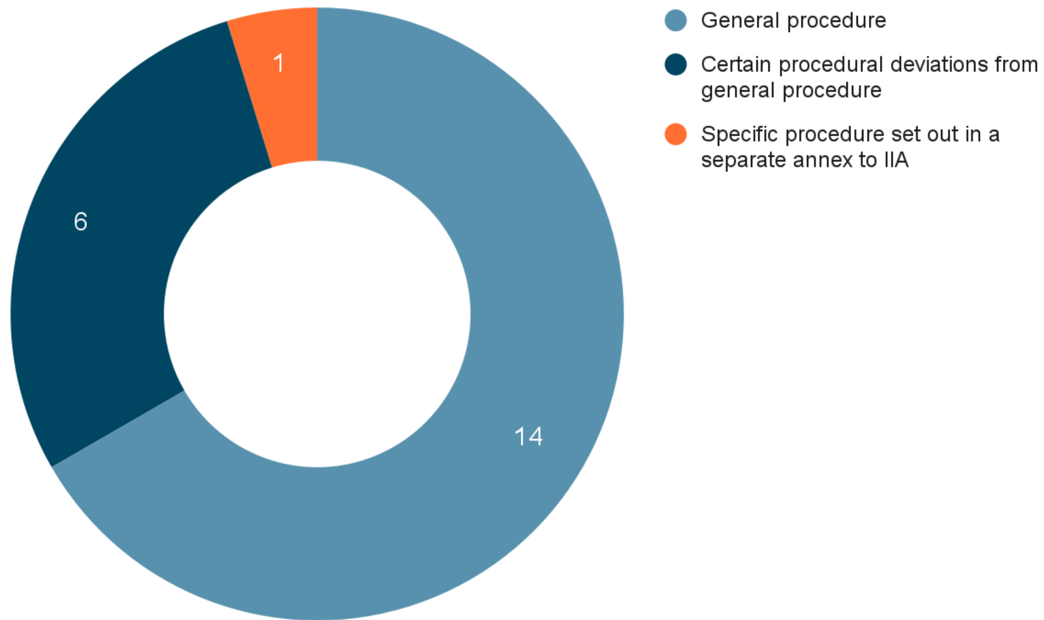
[191] Ibid.

[192] See Cecily Rose, "Questioning the Role of International Arbitration in the Fight Against Corruption" (2014) 31 Journal of International Arbitration 183, 193–195.

Figure 21: Procedures applicable to SSDS disputes arising out of anti-corruption commitments (number of IIAs)



Source: Authors' mapping.

175. One IIA, which contains a separate annex with rules of procedure applicable to the disputes arising out of anti-corruption commitments, is the Canada–Ukraine Modernized FTA (2023), which was discussed above.[193] Six other IIAs provide for limited procedural deviations in the chapter or in the provision dedicated to anti-corruption. This is a feature of recent IIAs, as all seven IIAs were concluded after 2016. Notably, four of these IIAs

[193] See para. 91 above.

were concluded by Canada,[194] which is in line with Canada's growing attention towards corruption issues.[195]

176. Procedural deviations are similar across IIAs, notably requiring or encouraging that:

a. The contracting States ensure participation of the domestic authorities responsible for anti-corruption issues during the pre-arbitration consultations and other non-binding dispute resolution procedures; and

b. Arbitrators chosen to hear the dispute have expertise in the area of anti-corruption.[196]

177. To some extent, these requirements may address the possible reasons for States' reluctance to enforce anti-corruption commitments in arbitration, which were discussed above.[197] First, participation of the domestic anti-corruption authorities in pre-arbitration consultations may increase the chances of States settling their dispute and not having their claims heard in arbitration. Second, even if the inter-States dispute ends up in arbitration, arbitrators with expertise in the area of corruption may deal more efficiently with the issues that arise.

178. At the same time, it bears noting that the requirement of arbitrators' expertise in the area of anti-corruption is rather vague as it is not clear what exactly it entails, i.e., whether the expertise means previous involvement of an arbitrator in cases where corruption was raised or whether it includes previous work in international or domestic anti-corruption authorities or whether it requires something else entirely. If the wording of this requirement is strict in IIAs, disputing States may experience problems with the formation of the arbitral tribunal or may see challenges emerging in the future on the alleged lack

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[194] Out of twenty-one IIAs analyzed in this subsection, six IIAs are concluded by Canada. Four of the six IIAs provide for specific procedures to be applied to disputes arising out of anti-corruption commitments, and these are the most recent of Canada's IIAs in the dataset (Canada–Ukraine Modernized FTA (2023); USMCA (2018); CPTPP (2018); TPP (2016)). In one IIA, these commitments are subject to the general procedure (Canada–Panama FTA (2010)). Only in one IIA are anti-corruption commitments not subject to SSDS at all (Canada–Honduras FTA (2013)).

[195] See, e.g., Matthew A. J. Levine, "Canadian Initiatives Against Bribery by Foreign Investors – IISD Report" (IISD, June 2019), 18 (admitting "the potential for Canada to play a leadership role in combatting corruption internationally").

[196] See, e.g., UMSCA (2018), Art. 27.8 ("[...] the panel shall have expertise in the area of anticorruption under dispute.").

[197] See para. 172 above.

of an arbitrator's expertise.[198] For this reason, it is advisable for States to either clarify what they expect from arbitrators having experience in the area of anti-corruption or to include less strict wording in their IIAs instead.[199]

2.3.2. Investor-State dispute settlement

Key takeaways
Among twenty-one IIAs with substantive anti-corruption commitments: ● Twelve IIAs do not provide for ISDS. ● In those IIAs that do provide for ISDS, anti-corruption commitments are subject to ISDS only in one IIA, namely, the ECOWAS Common Investment Code (2019). ● Where anti-corruption commitments are not formally subject to ISDS, in theory, they could nevertheless be used by investors to buttress the analysis of legitimate expectations which is often relevant in determining a breach of the FET standard.

179. More than half of the IIAs containing substantive anti-corruption commitments (twelve out of twenty-one) do not provide for ISDS at all, hence, they fall outside the scope of this analysis.

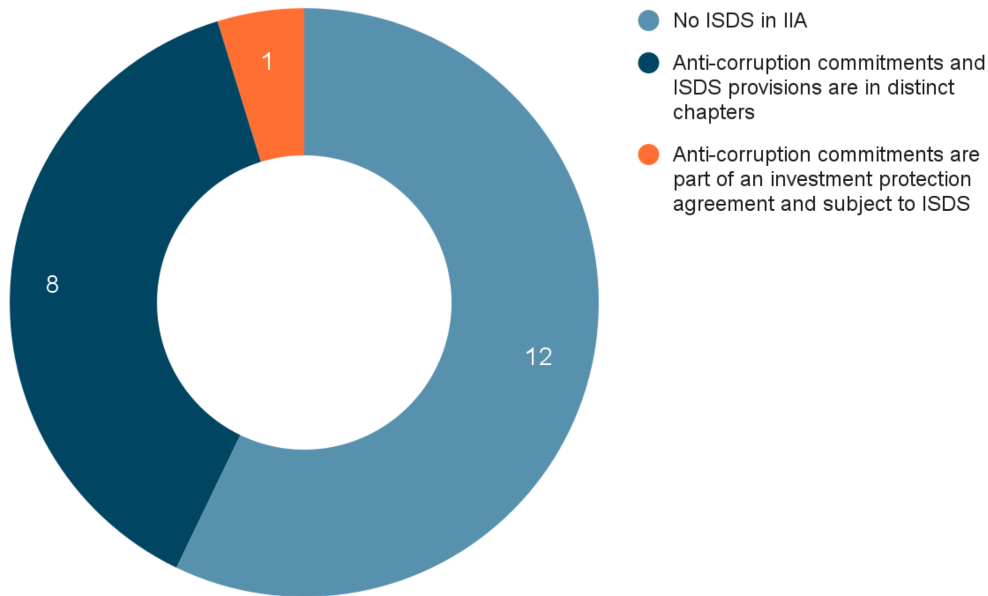
180. Out of the remaining nine IIAs, only one subjects anti-corruption commitments to ISDS, while eight IIAs are structured in such a way that anti-corruption provisions and investment protection provisions, including ISDS, are contained in distinct chapters (**Figure 22**).[200]

[198] Generally, see ICC, *ICC Commission Report – Financial Institutions and International Arbitration* (ICC, 2016), 4 ("experience shows that the more specific the requirements laid down, the greater the risk of challenges for alleged lack of the required expertise").

[199] See, e.g., Australia–United Kingdom FTA (2021), Art. 28.15 ("[...] the Parties are encouraged to appoint panellists, in disputes arising under this Section, who have expertise or experience relevant to the anti-corruption issue under dispute" [emphasis added]).

[200] As was discussed above, normally investors are not allowed to submit claims arising out of commitments placed outside investment chapters. See para. 104 above.

Figure 22: Availability of investor-State dispute settlement (ISDS) for anti-corruption commitments (number of IIAs)



Source: Authors' mapping.

181. The only IIA where anti-corruption commitments are subject to ISDS is the ECOWAS Common Investment Code (2019),[201] which, as discussed above, contains one of the most comprehensive approaches to anti-corruption issues.[202]

182. Although most IIAs do not subject anti-corruption commitments to ISDS (as is also the case with transparency commitments), investors may still try to use State-State anti-corruption provisions to buttress their analysis of legitimate expectations which is often relevant in determining a breach of the FET standard.[203] This is possible as some tribunals

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[201] ECOWAS Common Investment Code (2019), Art. 54(1) ("Any dispute between a Member State and an investor or between investors may be resolved through the use of consultations, good offices, mediation, conciliation, arbitration or any other agreed dispute resolution mechanism." [emphasis added]).

[202] See Subsection 2.2.1 above.

[203] See, e.g., *Bacilio Amorrortu v. Peru (1)*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 5 August 2022. This case was based on the Peru–United States Trade Promotion Agreement (2006), which contains an extensive section on anti-corruption that is outside the investment chapter. In this case, Peru objected to the jurisdiction of the tribunal arguing that the claim would not give rise to a favorable award for the investor as a matter of law, because the investor's general allegations of corruption could not be subject of a treaty claim as per the FTA's

have previously found that "corruption, if found, would constitute a grave violation" of the FET standard.[204] If contracting States do not wish for such claims to be brought against them, it is advisable to clarify the scope of the FET or introduce "firewall provisions" in their IIAs.[205]

183. However, even firewall provisions may not exclude the risk that a State's violation of anti-corruption commitments can be taken into account by investment tribunals in apportioning the costs of the arbitration. As a matter of illustration, in two cases involving Uzbekistan, where corruption was established, Uzbekistan was ordered to bear its own legal costs and half of the arbitration costs, even though the awards were rendered in its favor and the applicable IIAs did not contain any anti-corruption commitments.[206] In particular, in *Spentex v. Uzbekistan*, the tribunal went even further as it "urged" Uzbekistan to donate eight million US dollars to "either the UNDP Global Anti-Corruption Initiative or the successor UNDP project 'Anti-corruption for Peaceful and Inclusive Societies'" under threat of an adverse costs order.[207] This approach remains exceptional in arbitration practice.

ISDS provisions. The investor countered by pointing to the FTA's anti-corruption chapter and arguing that it could be relevant for an analysis of legitimate expectations. Ultimately, the tribunal did not pronounce on the investor's counterargument, having rejected Peru's initial objection.

[204] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 422. See also *Lao Holdings N.V. v. Lao People's Democratic Republic I*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019, para. 162 (finding that "corruption of Government officials [...] is relevant to the issue of [...] the legitimacy of the Claimants' alleged 'legitimate' expectations of fair and 'equitable' treatment").

[205] See paras. 115–116 above.

[206] See *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 422; *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award, 27 December 2016 ("**Spentex v. Uzbekistan**") (award is not public). See Ayodeji Akindeire, *supra* n. 189, 865–879.

[207] Luke Eric Peterson and Vladislav Djanic, "In an Innovative Award, Arbitrators Pressure Uzbekistan – Under Threat of Adverse Cost Order – To Donate to UN Anti-corruption Initiative; Also Propose Future Treaty-Drafting Changes That Would Penalize States for Corruption" (22 June 2017), available at: https://www.iareporter.com/.

ANNEX A. FULL LIST OF IIAs MAPPED

No.	Short title	Status	Date of signature
1.	Angola–EU SIFA (2023)	Signed (not in force)	17.11.2023
2.	Canada–Ukraine Modernized FTA (2023)	Signed (not in force)	22.09.2023
3.	EU–New Zealand FTA (2023)	Signed (not in force)	09.07.2023
4.	EFTA–Moldova FTA (2023)	Signed (not in force)	27.06.2023
5.	Australia–India ECTA (2022)	In force	02.04.2022
6.	New Zealand–United Kingdom FTA (2022)	In force	28.02.2022
7.	Pacific Alliance–Singapore FTA (2022)	Signed (not in force)	26.01.2022
8.	Australia–United Kingdom FTA (2021)	In force	17.12.2021
9.	Cambodia–Republic of Korea FTA (2021)	In force	26.10.2021
10.	Iceland–Liechtenstein–Norway–United Kingdom FTA (2021)	Signed (not in force)	08.07.2021
11.	Israel–Republic of Korea FTA (2021)	Signed (not in force)	12.05.2021
12.	EU–United Kingdom Trade and Cooperation Agreement (2020)	In force	30.12.2020
13.	Moldova–United Kingdom Partnership, Trade and Cooperation Agreement (2020)	In force	24.12.2020
14.	Indonesia–Republic of Korea CEPA (2020)	In force	18.12.2020
15.	Kenya–United Kingdom EPA (2020)	In force	08.12.2020

16.	Japan–United Kingdom CEPA (2020)	In force	23.10.2020
17.	Cambodia–China FTA (2020)	In force	12.10.2020
18.	ECOWAS Common Investment Code (2019)	In force	22.12.2019
19.	China–Mauritius FTA (2019)	In force	17.10.2019
20.	Armenia–Singapore Agreement on Trade in Services and Investment (2019)	In force	01.10.2019
21.	EU–Viet Nam Investment Protection Agreement (2019)	Signed (not in force)	30.06.2019
22.	Australia–Hong Kong Investment Agreement (2019)	In force	26.03.2019
23.	Australia–Indonesia CEPA (2019)	In force	04.03.2019
24.	EFTA–Indonesia EPA (2018)	In force	16.12.2018
25.	USMCA (2018)	In force	30.11.2018
26.	EU–Singapore Investment Protection Agreement (2018)	Signed (not in force)	15.10.2018
27.	Georgia–Hong Kong FTA (2018)	In force	28.06.2018
28.	EFTA–Turkey FTA (2018)	In force	25.06.2018
29.	Ecuador–EFTA FTA (2018)	In force	25.06.2018
30.	AfCFTA (2018)	In force	21.03.2018
31.	CPTPP (2018)	In force	08.03.2018
32.	Central America–Republic of Korea FTA (2018)	In force	21.02.2018
33.	Australia–Peru FTA (2018)	In force	12.02.2018
34.	Singapore–Sri Lanka FTA (2018)	In force	23.01.2018
35.	Chile–Indonesia CEPA (2017)	In force	14.12.2017

36.	Armenia–EU CEPA (2017)	In force	24.11.2017
37.	ASEAN–Hong Kong Investment Agreement (2017)	In force	12.11.2017
38.	China–Hong Kong CEPA Investment Agreement (2017)	In force	28.06.2017
39.	PACER Plus (2017)	In force	14.06.2017
40.	China–Georgia FTA (2017)	In force	13.05.2017
41.	Canada–EU CETA (2016)	Signed (not in force)	30.10.2016
42.	EFTA–Georgia FTA (2016)	In force	27.06.2016
43.	EFTA–Philippines FTA (2016)	In force	28.04.2016
44.	TPP (2016)	Signed (not in force)	04.02.2016
45.	EU–Kazakhstan EPCA (2015)	In force	21.12.2015
46.	Singapore–Turkey FTA (2015)	In force	14.11.2015
47.	Australia–China FTA (2015)	In force	17.06.2015
48.	China–Republic of Korea FTA (2015)	In force	01.06.2015
49.	Republic of Korea–Viet Nam FTA (2015)	In force	05.05.2015
50.	Republic of Korea–New Zealand FTA (2015)	In force	23.03.2015
51.	ASEAN–India Investment Agreement (2014)	Signed (not in force)	12.11.2014
52.	Canada–Republic of Korea FTA (2014)	In force	22.09.2014
53.	EU–Georgia Association Agreement (2014)	In force	27.06.2014
54.	EU–Moldova Association Agreement (2014)	In force	27.06.2014

55.	EU–Ukraine Association Agreement (2014)	In force	27.06.2014
56.	Treaty on the Eurasian Economic Union (2014)	In force	29.05.2014
57.	Malaysia–Turkey FTA (2014)	In force	17.04.2014
58.	Australia–Republic of Korea FTA (2014)	In force	08.04.2014
59.	Canada–Honduras FTA (2013)	In force	05.11.2013
60.	Chile–Thailand FTA (2013)	In force	04.09.2013
61.	New Zealand–Taiwan Province of China ECA (2013)	In force	10.07.2013
62.	Bosnia and Herzegovina–EFTA FTA (2013)	In force	24.06.2013
63.	EFTA–Costa Rica–Panama FTA (2013)	In force	24.06.2013
64.	Chile–China FTA Investment Agreement (2012)	In force	09.09.2012
65.	Chile–Hong Kong FTA (2012)	In force	07.09.2012
66.	Central America–EU Association Agreement (2012)	In force	29.06.2012
67.	Colombia–Ecuador–EU–Peru Trade Agreement (2012)	In force	26.06.2012
68.	Australia–Malaysia FTA (2012)	In force	22.05.2012
69.	China–Japan–Republic of Korea Trilateral Investment Agreement (2012)	In force	13.05.2012
70.	EFTA–Montenegro FTA (2011)	In force	14.11.2011
71.	EFTA–Hong Kong FTA (2011)	In force	21.06.2011

72.	India–Malaysia FTA (2011)	In force	18.02.2011
73.	Australia–New Zealand Investment Protocol (2011)	In force	16.02.2011
74.	Belarus–Kazakhstan–Russia Agreement on Services and Investment (2010)	In force	09.12.2010
75.	Chile–Malaysia FTA (2010)	In force	13.11.2010
76.	EU–Republic of Korea FTA (2010)	In force	06.10.2010
77.	EFTA–Peru FTA (2010)	In force	14.07.2010
78.	EFTA–Ukraine FTA (2010)	In force	24.06.2010
79.	Canada–Panama FTA (2010)	In force	14.05.2010
80.	China–Costa Rica FTA (2010)	In force	08.04.2010
81.	Costa Rica–Singapore FTA (2010)	In force	06.04.2010
82.	Hong Kong–New Zealand CEPA (2010)	In force	29.03.2010